



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO: CA&R:195/2022

In the matter between:

BULELANI MAGOPHENI

FIRST APPELLANT

BAXOLISE MSESIWE

SECOND APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

NORMAN J :

[1] The appellants were arraigned before the Regional Court Magistrate, sitting in Port Alfred on two counts; first count was kidnapping and a second count of rape. They pleaded not guilty to both counts. They were found guilty on both counts and were both sentenced to undergo three years imprisonment for kidnapping the complainant and to life imprisonment in respect of the rape charge. The two sentences were ordered to run concurrently. In the exercise

of their automatic right of appeal, the appellants lodged the appeal against the convictions and sentences.

Relevant facts

- [2] On 31 July 2016, during the early hours of the morning, the complainant was in the company of her friend Mr Ayanda Baliti (Ayanda). They were walking together from Wolves Tavern to Ayanda's home. They had consumed alcohol but were not drunk. There was illumination on the road from the municipal street lights. The appellants approached them. The first appellant is the complainant's ex-boyfriend. Ayanda was chased away. The appellants accosted the complainant and forced her to go with them to the shack of the second appellant's brother. Both appellants had sexual intercourse with the complainant. She requested them to use a condom because she still had young children. They did.
- [3] It is common cause that the second appellant's brother, Mr Sivuyile Msesiwe (Sivuyile) entered the shack when the second appellant was on top of the complainant having sexual intercourse with her. The complainant was crying and she reported to him "*Boetie these guys are raping me.*" Sivuyile assaulted the second appellant with a stick whilst he was having sexual intercourse with the complainant. He went out to call his neighbour Mr Luthando Binza (Luthando).
- [4] They both went to the shack and instructed the complainant, who was crying and shivering, to get up. The second appellant was pulling the complainant refusing to let her go with Luthando. A struggle ensued as the second appellant continued to pull the complainant while Luthando was also pulling her from him. Luthando testified that the second appellant was very strong

and he overpowered him. It was at that stage that Luthando hit the second appellant with a pick handle. He managed to walk with the complainant to his house. The complainant also reported to him that she was raped by the appellants. He called the police and complainant was taken to hospital. Complainant's evidence was corroborated by Luthando and Sivuyile in material respects. She was examined by a forensic nurse who did not find any injuries. She recorded in her conclusions: *"There are no injuries noted but that doesn't make me say she wasn't raped."* She also recorded that: *"She was clapped on the face no injuries observed yet"*. The J88 report was admitted into evidence by consent.

- [5] Sivuyile was called to testify. He corroborated the evidence of the complainant. Sivuyile is related to the second appellant as they are cousins. He confirmed that upon his arrival the complainant was crying. He confirmed that she reported to him that the two appellants were raping her and she had even requested them to use condoms. He saw the second appellant on top of the complainant on his arrival. He assaulted the second appellant with a stick.
- [6] Ayanda also testified. He corroborated the evidence of the complainant that the appellants forced the complainant to go with them against her will. The second appellant was known to this witness. The State closed its case.
- [7] The first appellant testified that he had consensual sexual intercourse with the complainant. The complainant went with him willingly on the night in question as they were ex-lovers.
- [8] The second appellant also testified. He testified that he had consensual sexual intercourse with the complainant. He disputed that he kidnapped the

complainant. His version was that he had paid the complainant to have sexual intercourse with him.

Grounds of appeal

[9] The grounds of appeal against the convictions are that the trial court erred in its assessment of the evidence and in finding that the appellants' guilt had been proved beyond reasonable doubt. The court erred in not treating the evidence of the complainant as a single witness, with caution.

[10] The grounds of appeal advanced against sentence are that both appellants are first offenders in so far as rape charges are concerned. It is contended by the appellants that the effective sentence of life imprisonment is shockingly harsh and unjust having regard to the cumulative effect of their personal circumstances. The appellants argued that the court *a quo* should have found that their personal circumstances serve as factors that traditionally play a role in sentencing and should have found that those factors constitute substantial and compelling circumstances justifying a departure from the minimum sentence of life imprisonment.

Mitigating factors

[11] The first appellant submitted that he was 35 years at the time of his sentence. He was raised by his maternal grandmother because his mother disappeared and his father got arrested. He passed matric. His father played a role in his life when he was a teenager. He is married with three children born of the marriage. He is separated from his wife and their children reside with her in Bathurst. He has two other children from other relationships. His wife is a casual worker at one of the restaurants in Bathurst. He was working but

resigned in 2006. At the time of his arrest he was not employed. He passed matric in 2002. He could not further his studies due to financial constraints. He worked for BUCO as a general worker prior to his arrest. He was earning R1900 per week. Prior to him working for BUCO he worked at the Caltex Garage earning R3 400.00 per month.

[12] He had the following previous convictions: in 1998 he was convicted of housebreaking with intent to steal and theft . His sentence was postponed for four years. In 2004 he was convicted of housebreaking with intent to steal and theft and was sentenced to undergo 18 months imprisonment, 6 months of which was suspended for 5 years. In 2006 he was again convicted of housebreaking with intent to steal and theft . He was sentenced to undergo 18 months imprisonment with 6 months suspended. In 2015 he was convicted for *crimen injuria* and was sentenced to pay a fine of R500.00. On 08 June 2017 he was convicted of escaping from lawful custody and was sentenced to undergo 12 months imprisonment.

[13] According to the pre-sentencing report compiled by Ms N. Sakata in respect of the first appellant, she recommended that the only appropriate sentence would be a term of imprisonment and she highlighted the benefits thereof as being that:

- (a) **the appellant would be detained in a structural and secured environment; and**
- (b) **a multi-disciplinary team would be available in the correctional centre and he would have access to a variety of professionals that would impact positively on his rehabilitation such as**

educators, religious ministries for spiritual upliftment, social workers, psychologists and nurses.

[14] Ms Sakata also compiled a pre-sentencing report in respect of the second appellant. The second appellant was born on 27 December 1982. He is not married and does not have any children. His family reported to Ms Sakata that he started displaying criminal behaviour from the time he was 13 years old. From then onwards he was in and out of prison until he became an adult. His sister reported that he did not learn from his criminal mistakes, he continued doing so even after his release from prison.

[15] He was raised by his biological parents who separated when the second appellant was 10 years old. Thereafter the second appellant went to reside with his biological father in King Williams Town. His paternal aunt took care of him. His father provided for his needs. Prior to his arrest for these offences he was doing odd jobs. He reported that he was working for a civil construction company in Port Alfred where he was receiving an amount of R1 400 per month. He went up to Grade 10 at school. He has previous convictions which are listed as:

- (a) **On 31 March 2004 he was convicted of house breaking with intent to steal and theft and was sentenced to 2 years and 6 months imprisonment.**
- (b) **On 5 December 2006 he was convicted of theft and was sentenced to 2 years imprisonment with 1 year suspended for 5 years.**

(c) **On 4 August 2011 he was convicted of robbery and theft and was sentenced in respect of count 1 to 3 years imprisonment and count 2 he was sentenced to 2 years imprisonment.**

[16] At the time of commission of these offences the second appellant was 34 years old. Ms Sakata also recommended that imprisonment was the only appropriate form of sentence that would suit the aggravating nature of the offence committed.

Legal submissions

[17] Mr Charles for the appellants submitted that the complainant was a single witness in relation to what transpired at the place where the sexual intercourse took place. In this regard, he submitted that her evidence should be treated with caution. He further submitted that the trial court erred in its assessment of the evidence and in finding the appellants guilty of the offences they were charged with. He urged the court to allow the appeal against the convictions.

[18] In relation to the sentences, he submitted that both appellants were first offenders in relation to rape. He submitted that the trial court misdirected itself by not affording proper weight to a factor relevant to the imposition of sentence such as the appellants' personal circumstances and the seriousness of the crime. That, he argued, justified interference by this court in the convictions and the sentences. He relied on **S v Zinn**¹ submitting that the sentence imposed was overly harsh.

¹ **S v Zinn** 1969 (2) SA 537 (A) at 540 F.

[19] The trial court should have found that there were substantial and compelling circumstances and thereafter impose a lesser sentence. He relied on **S v Fazzie**².

[20] Ms Phikiso, for the State, submitted that on the issue of consent the trial court was correct to reject the versions of the appellants on the basis that they were improbable and were not reasonably possibly true. The evidence of complainant was found to be satisfactory in every material respect and was corroborated hence it was accepted by the trial court.

[21] In respect of sentence she submitted that the trial court correctly considered the personal circumstances of the appellants. The appellants were not first offenders. She relied on **S v Matyityi**³ for the submission that the appellants showed no remorse:

“[13] Remorse is a knowing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught, is a factual question.”

[22] She further submitted that the finding by the trial court that the absence of physical injuries does not constitute substantial and compelling circumstances was correct. In this regard, she relied on the provisions of section 5(3)(A) of the Criminal Law Amendment Act 38 of 2007. The trial court considered the psychological trauma suffered by the complainant as contained in the victim impact report and the probation officer’s reports. She argued that rape is a very serious offence as it was found in **S v Chapman**⁴.

² **S v Fazzie** and Others 1964 (4) SA at 684 (A-C); **S v Malgas** 2001 (1) SACR 469 (SCA).

³ **S v Matyityi** 2011 (1) SACR 40 (SCA) at para 13.

⁴ **S v Chapman** 1997 (2) SACR 3 (SCA) at page 5 para (b).

[23] The trial court also found that the versions of the appellants were irreconcilable with the facts before court and it accordingly rejected them. It also found that the State proved beyond reasonable doubt that there was no consent. Both appellants had sexual intercourse with the complainant without her consent. The trial court found that the State succeeded in proving both charges against the appellants beyond reasonable doubt.

Test on appeal

Discussion

[24] It is trite that a court of appeal may only interfere with convictions where it appears that the trial court misdirected itself in relevant or material respect in its assessment of the evidence and in its findings of fact pursuant thereto.⁵

[25] The trial court applied the cautionary rule in assessing the complainant's evidence. It found that there was sufficient evidence adduced by the State to prove that the complainant was kidnapped by the appellants. They took her from the company of Ayanda against her will. Ayanda corroborated her evidence in this regard. The two witnesses Sivuyile and Luthando corroborated the complainant's evidence in relation to the rape charge and the reports she made to them. The emotional state that the complainant was in was observed by these witnesses and was also recorded under "mental health and emotional status" on the J88 medical report by the nurse who examined her after the ordeal, as "*Looks depressed – kept crying during the interview*".

⁵ Chapman , supra, page 4 para (d).

[26] Section 208 of the Criminal Procedure Act 51 of 1977 provides:

*“208. Conviction may follow on evidence of single witness.
An accused may be convicted of any offence on the single evidence of any competent witness.”*

It is apparent from this section that the testimony of a single witness must still be credible, her evidence should be clear and satisfactory in every material respect.

[27] In ***Mahlangu & Another v The State***⁶ the Supreme Court of Appeal found that the court can base its findings on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect. The record shows that the evidence of the complainant was reliable and satisfactory in every material respect. The trial court was alive to the cautionary rule and applied it. It follows that the attack on the convictions must fail.

[28] The principles regarding when a court of appeal may interfere with a sentence imposed by a trial court are now settled. In ***S v Rabie***⁷ Holmes JA stated:

- “1. *In every appeal against sentence, whether imposed by a magistrate or a Judge the Court hearing the appeal –*
 - (a) *Should be guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial court”; and*
 - (b) *Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised.*
2. *The list under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”*

[29] The Constitutional Court has embraced those principles⁸ in, amongst others,

S v Bogaards⁹ as follows:

⁶ ***Mahlangu & Another v The State*** 2011 (1) SACR at page 164.

⁷ ***S v Rabie*** 1975 SA 855 (A) at 857 D – F.

⁸ ***S v Sadler*** [2000] 2 ALL SA 121 (A); ***Mbuqe v S*** (53/2021) [2022] ZA SCA 37 (4 April (2022)).

⁹ ***S v Bogaards*** [2012] ZACC 23; 2012 BCLR 126 (CC); 2013 (1) SACR 1 (CC) para 41).

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below 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 would have imposed it.” (Footnotes omitted).

[30] It is therefore trite that this court shall not readily interfere with the sentence imposed by the court a quo not unless the sentence imposed falls foul of the principles enunciated in the matters referred to. The court *a quo* had regard to the personal circumstances of the appellants; the impact of the rape on the complainant (who had been affected psychologically and was having nightmares), and balanced the interests of the appellants families and those of the community at large regarding the offences as recorded in the pre-sentence reports provided to the trial court.

[31] There is no evidence that the trial court misdirected itself. The personal circumstances of the appellants are not out of the ordinary. The fact that these were their first rape convictions pales by comparison if this court has regard to the indignity and sexual violation the complaint suffered. The aggression and resistance they displayed towards Sivuyile and Luthando who were rescuing the complainant was indicative of their resolve to continue invading the complainant’s body as if they owned it.

[32] The trial court weighed all those factors before imposing sentences. It concluded:

“ I cannot find anything either individually nor collectively which qualifies as substantial and compelling circumstances so as to deviate from the prescribed minimum sentence for accused 1 and 3 on count 2.”

[33] I do not find that the trial court misdirected itself either in relation to the convictions or the sentences imposed. Accordingly, I find no reason to interfere with both the convictions and the sentences of the trial court in respect of both appellants.

[34] In the result, I make the following Order:

The appeals against both convictions and sentences are dismissed.

T.V. NORMAN

JUDGE OF THE HIGH COURT

I agree.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Date Heard : 25 October 2023

Judgment Deliver on : 14 November 2023

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