



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

CASE NO.: CA&R154/2022

In the matter between: -

PIETER VAN SCHALKWYK

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

NORMAN J:

[1] The appellant was convicted in the Regional Court, sitting in Aliwal North, Eastern Cape on two counts, one of rape read with section 51(2) of Act 105 of 1998 as amended and another of assault with intent to do grievous bodily harm. He was sentenced in respect of the rape charge to undergo life imprisonment. A period of five years imprisonment was imposed in respect of the assault with intent to do grievous bodily harm charge. The two sentences were ordered to run concurrently.

[2] The appeal is against both the conviction and sentence in respect of the rape charge. The appeal is opposed by the State.

Grounds of appeal

[3] The appellant raised the following grounds of appeal: That the trial court misdirected itself by finding that the appellant's version is improbable and by rejecting it; the court also misdirected itself by finding that the State had proved its case beyond reasonable doubt; the trial court overlooked the contradictions from the evidence of the complainant and erred by concluding that such contradictions were immaterial; and erred in finding that the evidence of the complainant was satisfactory in all material respects. The appellant contends that based on all those grounds the trial court misdirected itself.

[4] In so far as the sentence is concerned the appellant contended that: The trial court failed to assess and consider the personal circumstances of the appellant; by so doing it over emphasized the seriousness of the offence and the interests of society; it failed to strike a balance between the three factors of sentence and failed to properly exercise its discretion in this regard; it erred in not finding that substantial and compelling circumstances existed and thus deviate from the minimum sentence; it erred in finding that the time spent by the appellant in custody does not qualify as substantial and compelling circumstance because it was minimal; and further contended that the sentence was overly harsh. The appellant submitted that based on all those grounds the court misdirected itself and this court should interfere with the sentence imposed.

[5] Mr Sojada appeared for the appellant and Ms Phikiso appeared for the respondent.

Relevant facts

[6] The appellant and the complainant have one boy child born out of their romantic relationship which had ended when the incident at issue occurred. On 21 January 2018, their son informed the complainant that the appellant had sold to him a schoolbag for R20.00. The child was looking for him because he wanted the schoolbag as he had paid for it. Complainant went looking for the appellant. While she was at her aunt's place the appellant also arrived. She approached the appellant and enquired about the school bag. They both agreed to go and fetch it from his place. It was after 21h00 when they arrived at the appellant's house. He instructed her to sit down because he was going to look for the school bag. She sat on the bed. He took out a knife and his cellphone from his pocket and placed them on the table. It was a fixed bladed knife. A certain uncle Paddy was present in the house but was in his own bedroom. Soon after their arrival uncle Paddy knocked and entered the bedroom of the appellant. He asked for matches from the appellant, bid them goodnight and left.

[7] According to the complainant they were conversing normally about their son and the appellant even prepared porridge for himself. Whilst eating he was also doing something on his phone. He did search around the room for the schoolbag. He could not find it. She indicated to him that it was getting late and she had to head home. Appellant refused to let her leave. He started to undress himself and was left wearing only his short pants.

[8] He took out his penis and instructed her to suck it. She refused. He took the knife from the table and held it in his hand. He grabbed the back of her head, pulled her forward, put his penis in her mouth and forced her to suck it. She did. He then ordered her to undress. She took off her pants and he caused her to lie on her back on the bed. He inserted his two fingers inside her vagina and placed his thumb on top of her vaginal bone and then hit her on the diaphragm with a fist. It appears that she lost consciousness. When she regained consciousness the appellant was on top of her, had his penis inside her vagina and was having sexual intercourse with her.

[9] He was still holding the knife in his other hand. She was struggling to breathe. The appellant insisted that she was not going anywhere. He instructed her to lie down on the floor. As she was lying on the floor she felt cold because she was not wearing her pants or underwear. She told him that she was feeling cold. He instructed her get on the bed and sleep with him. Again, he inserted his penis in her vagina and had sexual intercourse with her, without her consent. He was still holding his knife and held her after he had sexual intercourse with her. He fell asleep and the knife fell out of his hand. The complainant picked up the knife and jumped off the bed. The appellant woke up and noticed that the complainant had a knife in her hand. He ran past her and opened the door . He went outside and brought a big stone that he threw at her but she evaded it.

[10] A photo album of the house where the incident occurred was admitted into evidence by consent between the parties. A J88 medical report together with a DNA report were also handed in by consent. It was recorded on the medical report that vaginal examination of the complainant revealed a white discharge

which suggested possible male ejaculation. The doctor also found some condom remnants inside her vagina. The doctor also recorded that sexual assault could not be excluded. The DNA results were handed in. The appellant did not take issue at all with the admissibility of the DNA results. It was placed on record by his legal representative that he admitted having sexual intercourse with the complainant once, with consent, and he ejaculated inside her vagina.

[11] The appellant challenged the authenticity of the complainant's statement. As a result one Constable Ntloko who had taken down the statement was called to testify. She confirmed that she took down the statement. She further confirmed that the complainant was very emotional and was crying when she was making her statement. The complainant went to one Mr Donovan Kok (Donovan), the appellant's cousin, and reported to him that she had been raped and was from the hospital. Donovan did not enquire about the identity of the person who raped her because he was in a hurry to go to town.

[12] In his defence, the appellant denied that he had to look for the schoolbag because it was hanging on the wall and clearly visible. The complainant was talking to him about getting back together for the sake of their son. He felt sorry for her and agreed to have a relationship with her on condition that she would stop using drugs. They kissed. He went to buy her cigarettes. Upon his return he found her still sitting in his bedroom. They had sexual intercourse only once and it was by consent. Complainant left early the following morning to attend to the child. He was thereafter arrested. He stated that complainant had a motive to implicate him falsely because four weeks prior to the incident,

he together with his girlfriend, Janice, went past the complainant's house. The complainant came out of the house and swore at him.

Submissions

[13] Mr Sojada submitted that the evidence of the complainant, as a single witness, had contradictions that were not explained. He further argued that the trial court ought to have found that the version of the appellant was reasonably possibly true. On sentence he submitted that the trial court erred in finding that the time spent by the appellant in custody did not qualify to be regarded as substantial and compelling circumstance to deviate from life imprisonment. In this regard he relied on **S v Mvamvu**¹. He argued that the appeal should succeed on both conviction and sentence.

[14] Ms Phikiso, on the other hand, submitted that section 108 of the Criminal Procedure Act 51 of 1977, expressly allows for a conviction based on the evidence of a single witness as long as it is clear and satisfactory in every material respect. She further argued that section 60 of the Criminal Law Amendment Act 32 of 2007 provides that a court may not treat a complainant in a sexual offence with caution. She relied in this regard on **S v Mkohle**².

[15] She further submitted that the trial court did not misdirect itself on sentence. She relied on **S v Radebe and Another**³, for the submission that the pre-sentencing period in detention is only one factor that should be taken into

¹ **S v Mvamvu** 2005 (1) SACR 54 SCA.

² **S v Mkohle** 1990 (1) SACR 95 (A).

³ **S v Radebe and Another** 2013 (2) SACR 165 (SCA).

account in determining whether the effective period of imprisonment to be imposed is justified and proportionate to the crime committed.

Discussion

[16] The trial court accepted that the evidence of the complainant was that of a single witness. It found that her evidence was credible, clear and satisfactory in every material respect. It found, on the other hand, that the the appellant's version was not only improbable but it was false. The trial court in weighing up all the evidence found that the State had proved its case beyond reasonable doubt and accordingly rejected the appellant's version. On the issue of contradictions, those were found to be minor by the trial court. There were no contradictions in relation to the manner and sequence of the rape incident. This court, based on all the evidence, finds that the trial court did not misdirect itself on any of the findings, above and the appeal in this regard must fail.

[17] Insofar as the appeal regarding the sentence of life imprisonment is concerned the applicable principles and the powers of the court of appeal to interfere with the sentence are trite. Scott JA in **S v Kgosimore**⁴ stated:

[10] It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true

⁴ **S v Kgosimore** 1999 (2) SACR 238 (SCA) at 241 para 10.

inquiry. (Cf S v Pieters 1987 (3) SA 717 (A) at 727 G - I.) Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so"

[18] This Court has to decide whether the sentence imposed is appropriate having regard to the evidence before the trial court as a whole. When a court determines an appropriate sentence it must balance the seriousness of the offence, the interests of society and the personal circumstances of the accused person, without over-emphasising any of those factors. The Supreme Court of Appeal when dealing with an appeal against sentence lodged by the Director of Public Prosecutions in **DPP v Thabethe**⁵ referred to **S v Matyityi**⁶ where Ponnar JA addressed the sentencing process involving victims as follows:

"[16] An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim (See generally Karen Muller & Annette van der Merwe 'Recognising the Victim in the Sentencing Phase : The Use of Victim Impact Statements in Court.').."

⁵**DPP v Thabethe** (619/10) [2011] ZASCA 186 (30 September 2011) at para 21.

⁶ **S v Matyityi** 2011 (1) SACR 40 (SCA) paras 16.

[19] This court will only interfere with the sentence imposed if there is a material misdirection committed by the trial court. The complainant was not raped once. The aggressive manner in which she was forced to perform a sexual act on the appellant was inhumane. She was forced to have sexual intercourse with the appellant against her will. A knife was used to subdue her and at some stage she was hit with a fist. She lost consciousness at some stage. I do not find the sentence to be inappropriate. The Legislature deemed it appropriate that where an offence of this nature is committed a sentence of life imprisonment be imposed.

[20] The appellant is a repeat offender. He was 32 years old when he was sentenced in this matter. He has two sons aged 17 and 13 years, respectively. The youngest child's mother is the complainant. He was raised by his grandmother because his mother died when he was young. His father supported him financially. He does not reside with his children. He did not complete Grade 11. He obtained skills in construction and had worked in that industry in 2005. Prior to his arrest he was working and earning R3500.00 per month and was financially supporting his sister and his children. He was in custody for four months in respect of this offence whereafter he was released on bail. Whilst on bail he committed another offence and he was then kept in custody for two years. That period was correctly found not to have a bearing on the rape charge. This factor distinguishes this case from the *Mvamvu* decision relied upon by the appellant because in *Mvamvu* the period of incarceration of three and half years related to the rape offences. That is not the case herein.

[21] The State proved a number of previous convictions against the appellant. The trial court had regard to those previous convictions especially those that involved violence. The rape was perpetrated on the appellant's ex-lover and the mother of his child. She was affected emotionally by the incidents. The appellant's personal circumstances, the manner in which the rape was committed, the interests of society, all taken together and fairly balanced, reveal that the trial court did not misdirect itself in the exercise of its discretion and in finding that there were no substantial and compelling circumstances to deviate from life imprisonment. I do not find substantial and compelling circumstances which would have influenced the trial court to deviate from the minimum sentence. I accordingly find that there is no room to interfere either with the conviction or the sentence imposed.

[22] In the result the appeal against both conviction and sentence must fail.

ORDER

[23] The appeal against both conviction and sentence is dismissed.

T.V.NORMAN

JUDGE OF THE HIGH COURT

I agree

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Matter heard on : 25 October 2023
Judgement Delivered : 23 November 2023

APPEARANCES:

For the APPELLANTS : MR SOJADA
Instructed by : LEGAL AID BOARD SA

For the RESPONDENT : ADV PHIKISO
Instructed by : NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS