

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

Case No.: CA & R

185/2022

Date Heard: 17 May 2023

Date Delivered: 23 May

2023

In the matter between:

S [...] B [...]

Appellant

and

THE STATE

Respondent

JUDGMENT

RONAASEN AJ:

Introduction

[1] The appellant faced two counts of rape and one count of kidnapping in the Regional Court, Gqeberha.

[2] On 23 March 2021 the appellant was acquitted and discharged of one count of rape, pursuant to the provisions of section 174 of the Criminal Procedure Act, 51 of 1977. On 3 June 2021 he was convicted of the remaining count of rape (“Count 2”) and the charge of kidnapping (“Count 3”) and on 23 September 2021 he was sentenced as follows in respect of these counts:

2.1. Count 2 (rape) - imprisonment for life. The minimum sentence of life imprisonment was triggered by virtue of the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 read with Part I of Schedule 2 to this Act in that it was found that he had raped the complainant twice; and

2.2. Count 3 (kidnapping) - imprisonment for a period of five years, which sentence was ordered to run concurrently with the sentence of life imprisonment.

[3] This appeal lies against the appellant’s conviction and sentence on the two abovementioned counts. The appellant enjoys an automatic right of appeal in respect of his conviction and sentence on Count 2 (rape). His appeal on his conviction and sentence in respect of Count 3 proceeds with the leave of the Regional Court.

The evidence adduced by the State at the trial

[4] The State adduced the evidence of six witnesses at the trial. Only the evidence of three of these witnesses has any real bearing on the

outcome of this appeal and their evidence is summarised in the following paragraphs.

The complainant, Ntombovuyo Kete

- [5] During the evening of 7 July 2019, the complainant, who was 21 years old at the time, was enjoying the company of friends at a tavern known as Esther's Tavern in Walmer Township, Gqeberha. She confirmed the presence of the appellant in the tavern at the same time. The appellant wanted to socialise with her but she spurned his overtures as she said she was afraid of him.
- [6] Later she joined some acquaintances outside the tavern, one of whom was a witness for the State, Sandiswe Baskiti (the latter accompanied by her boyfriend). The appellant followed her outside the tavern. The group who had gathered outside the tavern, including the complainant and the appellant, decided to go to another tavern, known as Judge's Tavern.
- [7] The complainant decided not to follow her friends to the other tavern and headed off in a different direction. She noticed the appellant following her. He caught up to her and grabbed the front of her jacket, forcing her to accompany him.

[8] At one stage, in an effort to escape from the appellant, she ran to a house nearby and gained the attention of two ladies who resided there. She asked for their help and, in particular whether they could offer her a bed for the night. The appellant told the ladies that the complainant was his girlfriend. They refused to assist her.

[9] The complainant did not want to go with the appellant and tried to resist him. In this process the appellant hit the complainant with a bottle causing a cut above her right eye, which resulted in bleeding. Because of this violent action by the appellant the complainant was constrained to go with him.

[10] The appellant forced the complainant into a house, pushed her onto a couch and had sexual intercourse with her against her consent. She tried to resist him up to the point where he penetrated her vagina with his penis, whereafter she felt that she could no longer resist him.

[11] After this had occurred, she managed to go to a next-door house where an acquaintance resided. She spoke to the acquaintance and his girlfriend, asking for their assistance, which was refused. The appellant again forced her to go to the house where they had been previously and again forcibly and without her consent had vaginal intercourse with her.

Fezile Mtini

[12] This witness, a forensic nurse employed by the Department of Health at Dora Nginza Hospital, Gqeberha in a department specialising in the examination of patients who were the victims of sexual abuse, examined the complainant the day after the incident described above.

[13] He confirmed that the complainant had suffered a blunt-force injury, causing a three centimetre cut above her right eye, which was consistent with being hit with a bottle.

[14] According to him the plaintiff did not display any obvious vaginal injuries as a result of the trauma she had allegedly suffered, but he said that this was not unusual particularly as the complainant was a young, sexually active woman.

Sandiswa Baskiti

[15] The following aspects of the evidence of this witness require attention, namely:

- 15.1. when she and her boyfriend arrived at Esther's Tavern, she saw the complainant drinking inside with the appellant at the same table;
- 15.2. her confirmation of the fact that at a certain stage the complainant and the appellant had gone their separate ways and that she did not know where they had gone; and

- 15.3. prior to them parting company, the complainant did not display any visible injury to her face.

The evidence adduced by the appellant at the trial

[16] The appellant gave evidence in his own defence but did not call any witnesses.

[17] The appellant's version was to the following effect:

- 17.1. he and the complainant knew each other and were enjoying drinks together at Esther's Tavern;
- 17.2. the complainant and he had enjoyed a relationship previously which included sexual relations, but which had ended because of the unhappiness of his girlfriend;
- 17.3. the complainant joined her friends outside Esther's Tavern and she called him to come out too;
- 17.4. he and the complainant went along to Judge's Tavern, but because there was no place to sit, the complainant had suggested to him that they "*must go to sleep*";
- 17.5. later in the evening he saw the complainant kissing another man, which angered him as "*she was mine*". On observing her interaction with this other man he slapped her in her face with his right hand on which he was wearing a number of rings;

- 17.6. thereafter he went away to go to sleep. He did not have sexual intercourse with the complainant;
- 17.7. she only accused him of raping her, as his girlfriend, two months prior to 7 July 2019, had assaulted the complainant due to her involvement with the appellant.

General legal principles relating to the question of the appellant's conviction on the two counts concerned

[18] The following principles can be gleaned from *Tshiki v The State* [2020] ZASCA 92 (18 August 2020) at [13]:

- 18.1. in criminal proceedings the State, throughout, has the onus to prove an accused's guilt beyond a reasonable doubt;
- 18.2. an 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;
- 18.3. thus, if the accused's version is reasonably possibly true, he/she would be entitled to an acquittal; and

18.4. the conviction of an accused can accordingly only be sustained if, after consideration of all the evidence, his/her version of events is found to be false.

[19] The version of an accused cannot be rejected merely because the court finds the evidence of the witnesses for the State to be credible. The correct approach is for the court to apply its mind not only to the merits and demerits of the evidence of the witnesses for the State and the defence, but also the probabilities of the case. *S v Singh* 1975 (1) SA 227 (N) at 228.

Was the appellant correctly convicted

[20] In my view this question must be answered in the affirmative. The salient evidence was correctly and well evaluated by the Magistrate. He correctly applied the cautionary rule applicable to single witnesses, where the evidence of the complainant was such.

[21] The evidence of the complainant was corroborated in the following crucial respect by the evidence of the witnesses:

21.1. Mtini, who confirmed that the injury the complainant had sustained above her right eye was consistent with being hit by a bottle; and

21.2. Baskiti, summarised in paragraphs 15.2 and 15.3, above.

[22] The evidence of the complainant was plausible and unembellished. It was correctly characterised by the Magistrate as being truthful. For the reasons set out below her evidence was not seriously challenged in cross-examination. The discrepancies between her evidence and that of Baskiti were not material. She denied any relationship with the appellant.

[23] The appellant, on the other hand, was correctly characterised by the Magistrate as a poor witness whose demeanour in the witness box confirmed the lack of credulity and the improbability attaching to his evidence. Vitally, none of the important aspects of his evidence in chief had been put to the complainant in cross-examination, which confirms the Magistrate's finding that the appellant had endeavoured to adapt his evidence to fit in with certain of the aspects of the witnesses for the State (particularly that of Baskiti) which suited him.

[24] The improbability of the version of the appellant is confirmed by his allegation that the complainant had accused him of rape as some form of revenge for the fact that the appellant's girlfriend had assaulted her some two months prior to 7 July 2019, if you consider his evidence that the relationship between him and the complainant was one of friendship.

[25] The credible evidence of the complainant and the corroborative witnesses confirmed that the appellant's version and explanation were not only improbable but were false beyond a reasonable doubt.

[26] Given the falsity of the appellant's explanation his conviction on the two counts concerned must be sustained.

Sentencing

[27] In terms of the charge sheet in respect of Count 2, the State requested that in the event of a conviction a sentence of life imprisonment be imposed in respect of the appellant given that he had raped the complainant twice. The Regional Court, correctly, found that that had occurred. In such event section 51(1) of the Criminal Law Amendment Act, 105 of 1997 provides that "*a regional court or a High Court shall sentence a person who it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life*".

[28] Section 51(3) of the said Act provides that where a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence. In this case the Magistrate found that no substantial and compelling circumstances existed which would justify the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment.

[29] In *S v Dodo* 2001 (3) SA 382 (CC) at [11] the Constitutional Court endorsed and adopted the interpretation of the words “substantial and compelling circumstances” applied in *S v Malgas* 2001 (2) SA 1222 (SCA) at [25] in terms of which the Supreme Court of Appeal, in interpreting the words, detailed a step-by-step procedure to be followed in applying the test to the actual sentencing situation. This operational construction is summarised in the judgment as follows:

“A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in

personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided”.

[30] The appellant, measured against the abovementioned standards, has not demonstrated the existence of substantial and compelling circumstances in respect of the offence of rape to which the statutory minimum sentence requirements apply and of which he was convicted, which would have allowed the Regional Court to impose a lesser sentence than the sentence of life imprisonment it found it was statutorily obliged to impose.

[31] Objectively, considering all the relevant facts in this case, I am unable to discern the existence of substantial and compelling circumstances which would justify the imposition of a lesser sentence.

[32] The Legislature, rightly so, in enacting section 51 of the Act, wished to ensure that consistently heavier sentences would be imposed in relation to the serious crimes covered by section 51, while still promoting the objects of the Constitution and the Bill of Rights.

[33] Our courts have consistently characterised the serious crime of rape as a repulsive crime, which is a humiliating, degrading and brutal invasion of the privacy, dignity and person of a woman.

[34] In this case the following additional factors point to the absence of substantial and compelling circumstances which would allow for the imposition of a lesser sentence:

- 34.1. the absence of remorse on the part of the appellant;
- 34.2. the vicious assault inflicted on the complainant by the appellant, with a bottle;
- 34.3. the predatory manner in which he forced the complainant to accompany him;
- 34.4. the fact that the appellant, when the complainant sought help from third parties, lied to those third parties telling them that he and the complainant were boyfriend and girlfriend and were involved in a "domestic" argument which, no doubt, motivated them not to assist the complainant; and
- 34.5. the appellant's previous conviction for rape. In 2005 the appellant was convicted of rape by the High Court and sentenced to imprisonment for a period of 14 years. He was released in 2012 of, after having served roughly half of that sentence. The submission that the appellant should be regarded as a first offender as this prior conviction occurred more than 10 years ago is untenable. The prior conviction demonstrates the appellant's propensity for violence against women and for the commission of sexual offences against

them. The reduced period of imprisonment he served clearly had not had the appropriate rehabilitative effect.

[35] As stated, the appellant demonstrated no remorse. Further, he proffered only his poor socio-economic circumstances in mitigation which were insufficient to establish the existence of substantial and compelling circumstances to deviate from the minimum sentence requirement.

[36] Thus, there are no grounds to interfere with the imposition of the sentence of imprisonment for life on Count 2 (rape).

[37] In respect of the sentence of five years' imprisonment imposed for Count 3, (kidnapping) there is no basis for suggesting that the Magistrate exercised his discretion improperly or misdirected himself. Nor is the sentence imposed disturbingly inappropriate or disproportionate that no reasonable court would have imposed it. Here too, there is no basis to interfere with the sentence.

Order

[38] Accordingly, I make the following order:

The appeal on conviction and sentence is dismissed.

**O H RONAASEN
ACTING JUDGE OF THE HIGH COURT**

BLOEM J: I AGREE.

**GH BLOEM
JUDGE OF THE HIGH COURT**

Appearances:

For Appellant:

Mr MT Solani

Instructed by:

Legal Aid Local Office
Makhanda

For Respondent:

Adv S Soga
Office of the Director of Public

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