IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A130/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

DATE SIGNATURE

In the matter between:

JULY MAVUSO Appellant

And

THE STATE Respondent

Coram: Thupaatlase AJ et Twala J concurring

Date of hearing: 08 November 2021 - The Court directed that this matter be determined the on the papers without oral hearing.

Date of Judgment: 03 December 2021

This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto caselines system.

JUDGMENT

THUPAATLASE AJ

[1] It is notable that this court directed that this matter be determined on the papers without oral hearing, as provided for in Gauteng Division Consolidated Directives: re Court Operations during National State of Disaster issued by the Judge President of this Division on 18th of September 2020.

[2] This is an appeal against both conviction and sentence. Leave to appeal was granted by the learned regional court magistrate. The appellant was arraigned in the Regional Court sitting at Randfontein and charged as follows:

(i) count. 1: Contravening of a Protection Order in terms of the Domestic Violence Act, 116 of 1998;

(ii) count. 2: assault with intent to do grievous bodily harm (hereafter assault GBH);

(iii) count.3: kidnapping; and

(iv) count .4: rape in contravention of Section 3 of the Criminal Law (Sexual Offences Related Matters) Amendment Act read Section 51 of the Criminal Law Amendment Act (the CLAA).

[3] At the end of the trial the appellant was acquitted of the charge of kidnapping and convicted on the remainder of the charges. The issues for determination before this court are whether the appellant has been correctly convicted of the offences mentioned. In respect of the charge of rape specifically the issue is whether the appellant had sexual intercourse with or without the consent of the complainant. Furthermore, whether the trial court erred in imposing the sentence of ten years' imprisonment.

[4] The evidence can broadly be set out as follows: that the complainant and the appellant had been staying together for more than two decades in a love relationship which produced five children. At the time of the commission of these offences; there was a protection order that was obtained by the complainant against the appellant. The protection order prevented the appellant from physically, emotionally and sexually abusing the complainant.

[5] It is common cause that on the 11th January 2015 the complainant and the appellant slept in the shack that they shared with their eldest son. That night they had sexual intercourse as they had agreed by WhatsApp messages during that day. Their son left for work earlier that morning. The complainant was also due to leave for work later that morning.

[6] At around 05h00 the complainant woke up and poured water in a washing basin. It was at that stage that the appellant prevented her from continuing with her preparation. The complainant reminded the appellant about the protection order against him. She attempted to phone the police but the appellant stood up from the bed and pushed the complainant around. He grabbed a phone from her. A struggle ensued during which the appellant strangled the complainant. The complainant thereafter passed out.

[7] When she woke up she discovered that her phone was missing and the appellant was not in the room at the time. The complainant went outside but was met by the appellant

who ordered her back into the shack. She realised that she had been injured; she was bleeding from the chest. The appellant's mood changed and became aggressive and referred to the complainant as a bitch and demanded to have sexual intercourse with her.

[8] The appellant took off his clothes and asked the complainant to suck his penis. The complainant could not bring herself to doing it and became nauseous. The appellant ordered her to climb on the bed; and that the complainant should insert his penis in her vagina. She refused. The appellant inserted his penis in her vagina and raped her. After that the appellant left the shack and moments later returned with beers. He found the complainant dressed and he ordered to again take off her clothes and he again raped her. The third act of rape the appellant said it was a goodbye sexual intercourse as the complainant will be staying at her place of work.

[9] After this last act of rape, the appellant told the complainant to take a bath. She told him that she had already taken a bath but the appellant insisted that she washed herself again and even slapping her. The appellant accused the complainant of planning to report the incident to the police. On all occasions that the appellant went out of the shack to get more beer; he locked the complainant behind. Consequently, the complainant could not leave the shack. The following morning, she reported the incident to her son and also left for her place of employment

[10] A week later; the complainant laid a criminal complaint against the appellant and consulted a medical doctor. The doctor observed multiple healing superficial wounds of various sizes on the head, neck and chest. The wounds were caused by a sharp instrument, and further that he didn't conduct any gynaecological examination.

[11] The appellant's version of what happened that morning was that he had consensual sexual intercourse with the complainant. He denied to have assaulted the complainant nor conducted himself in a manner that amounted to violation of a protection order.

[12] It is a trite principle of our law that the onus is on the state to prove the guilt of the accused beyond any reasonable doubt otherwise if the explanation tendered by the accused is reasonably possibly true, he is entitled to be acquitted. In S v Shackell 2001(2) SACR 185 (SCA) para 30 the court stated the legal position as follows:

"It is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that mere preponderance is not enough. Equally trite is the observation that, in view of this standard of proof in criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be improbable that it cannot reasonably possibly be true".

[13] It is not enough or proper to reject an accused's version on the basis that it is improbable. The version of an accused can only be rejected once the court has found that on credible evidence, it is false beyond reasonable doubt. In S V 2000(1) SACR 453 (SCA) at page 455 the position is stated as follows:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true".

[14] I am satisfied that the complainant was a credible witness. She readily conceded that there was sexual intercourse that happened by consent during the night. The doctor observed the injuries on her neck and body. Furthermore, she conceded that she did not see the appellant inflict injuries on her. The testimony of the doctor was independently verifiable evidence. I do not find it probable that the complainant would conspire to fabricate charges against the appellant. The son of the complainant also confirmed her evidence regarding the injuries. Further he confirmed that the complainant reported the incident of rape. That she was emotional and crying when she recounted to him what had happened.

[15] The law regarding a finding of fact was restated in Stevens v S [2005] 1 All SA 1 (SCA), where the court sounded a warning concerning the dangers of what has been called 'a compartmentalised approach', that is an approach, which separates the evidence into compartments, where examination of the defence case is done in isolation from that of the State's case.

[16] In S v Van der Meyden 1999 (1) SACR 447 (W) at 449–50 the court stated as follows:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be".

[17] The dicta were approved by the Supreme Court of Appeal in Naude & another v S [2011] 2 All SA 517 (SCA). It is trite the court must account for all the evidence.

[18] This court can find no fault with a conclusion of the court a quo that the evidence of the complainant was satisfactory in all material aspects. It is my considered view that the Court a quo took into account the whole evidence before it and evaluated it holistically and correctly found that the State has proved its case against the appellant beyond reasonable doubt; and correctly found that the appellant assaulted the complainant, violated the protection order conditions and also raped her more than once.

[19] The approach of the court sitting as court of appeal was succinctly put as follows in S v Hadebe and Others 1997 (2) SACR 642 (SCA) at 645:

"Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against the finding of fact. In short 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] Counsel for the appellant submitted that the learned magistrate erred in finding that the complainant was a credible witness; especially given the fact that when she had the opportunity to call the police; she failed to do so. I am unable to agree with this submission. The complainant gave an explanation as to the reason she delayed before laying charges. She was fearful of the appellant. The complainant forwarded photos showing injuries to her employer, believing that her employer would take steps and call the police. The explanation is reasonable and acceptable.

[21] It was further submitted that it was strange that she took time before she could lay charges against the appellant. Counsel criticised the court a quo for accepting that as an error of judgment. This submission ignores what the complainant explained; which was that the appellant had threatened he would follow her wherever she went. No adverse inference can be made against her conduct in this regard.

[22] It is my respectful view that the Court a quo cannot be faulted in not accepting the evidence of the appellant for it was probably false and was unreliable. The appellant contradicted himself in many respects. In his plea explanation, he admitted to have had sexual intercourse with the complainant more than once. However, during cross-examination he changed his version and admitted to only one sexual intercourse on the 11th January 2015. The appellant was not able to explain the injuries that the complainant sustained. Furthermore, he was unable to explain why the complainant could not go to work on the day in question. This was despite the uncontroverted evidence that the complainant was preparing to go to work that morning.

[23] In conclusion this court must to emphasize the point that rape in any relationship; whether matrimonial or in any other form of relationship can still be perpetrated.

[24] In Tshabalala v The State; Ntuli v The State ZACC 48; 2020 (3) BCLR 307 (CC) (11 December 2019) three judges of the Constitutional court penned concurring judgments; and with the same vigour; expressed themselves in what they considered rape to mean. Mathopo AJ at para. 1 stated as follows:

"The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social

construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women".

[25] In her concurring judgment Khampepe J at para. 75 stated as follows:

"Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side".

[26] Victor AJ para. 83 also expressed a strong view and infused her approach with an international law and feminist perspectives and also emphasised the rejection of archaic evidential requirements in sexual offence cases and commented as follows:

"Other archaic evidential obstacles were the adherence to the prompt complaint rule, multiple witness consistency, and the identification of the first witness to whom the rape was reported. All of these underpinned the continued gender bias against the victims of sexual assault".

[27] The pronouncements quoted above serve to confirm the correctness by the trial court that despite the existence of a relationship between appellant and complainant; she did not consent to sexual intercourse. The trial court was correct not to make any adverse finding regarding the length of time it took for her to report the incident.

[28] The decision of what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to interfere only if the trial court's discretion was not 'judicial and properly exercised' which would be the case if the sentence that was imposed is 'vitiated by irregularity or misdirection or is disturbingly inappropriate''. (See S v Rabie 1975 (4) SA 855 (A)).

[29] In S v Ngcobo 2018 (1) SACR (SCA) 479 para 11the court dealt with the role of the appeal court regarding sentence and stated:

"At the outset this is an appeal in which the interference with sentence will be justified if the trial court is shown to have misdirected itself in some respect, or if the sentence imposed was disturbingly inappropriate that 'no reasonable court would have imposed it'. The test is not whether the trial court was wrong, but whether it exercised it discretion properly".

[30] The court a quo considered all the personal circumstances of the appellant including the fact that he was employed at the time of his arrest and that he was maintaining his family. The court considered the fact that the appellant was in custody for a period of two years before his trial was finalised. The court a quo found that to be a substantial and compelling factor enjoining it not to impose the minimum sentence as prescribed by the Act.

[31] In Ngcobo supra the court considered various judgments on this factor and stated as follows:

"In short, pre-conviction period of imprisonment is not on its own, a substantial and compelling circumstance; it is merely a factor in determining whether the sentence imposed is disproportionate or unjust".

[32] The prerogative to impose an appropriate sentence resides with the trial court. The powers of this court are strictly circumscribed where a sentence was properly imposed. The court a quo noted the seriousness of the crime of rape and also the invasion and violation of the rights of the complainant. The court concluded that there were substantial and compelling circumstances and therefore deviated from a prescribed mandatory life imprisonment.

[33] I am unable to find any misdirection on the part of the trial court when it imposed the sentence of 10 years' imprisonment nor is that sentence disproportionate in the circumstances of this case. The irresistible conclusion is that the appeal on both the conviction and sentence falls to be dismissed.

[34] In the circumstances, the following order is made:

(i) Appeal against both the conviction and sentence is dismissed.

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THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Instructed by: Legal Aid South Africa (Johannesburg Justice Centre)

For the Respondent: Adv. N Serepo

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