

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



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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.....
Date Judge M.L. Senyatsi

Case no: A79/21

In the matter between:

MADIKIZELA BONGIKHAYA

Appellant

and

THE STATE

Respondent

**Case Summary: APPEAL AGAINST CONVICTION ON RAPE AND KIDNAPPING.
Conviction and sentence confirmed.**

JUDGMENT

SENYATSI J (TWALA J Concurring)

[1] This is an appeal against conviction on rape and kidnapping of the appellant by the Regional Court held at Germiston.

[2] The appellant was charged and tried for the following charges:

2.1 Contravening the provisions of section 3 of Act 32 of 2007 (Rape) read with the provisions of section 51(1) of Act 105 of 1997 and

2.2 Kidnapping read with the provisions of section 51(1) of Act 105 of 1997.

[3] At the trial by court a quo, the appellant was legally represented and he pleaded not guilty to the charges on 14 August 2019 and was found guilty as charged on 26 October 2020.

[4] On 3 December 2020, the appellant was sentenced to life imprisonment for rape and five years for kidnapping. The sentence on kidnapping was ordered to run concurrently with the sentence on rape.

[5] The appellant who has an automatic right to appeal, appeals against his conviction and sentence. Although the criminal proceedings record is incomplete in that the record of the proceedings of 14 August 2019 is missing, the Defense on behalf of the appellant submitted that the appeal should proceed because on that day, the appellant pleaded and his plea explanation was recorded. We have no issue with hearing the appeal.

[6] In his plea explanation before court a quo, the appellant in dealing with the charge of rape stated that he and the complainant were in a love relationship and that they had a consensual intercourse.

[7] The appellant's ground for appeal is that the trial court erred in convicting him on the rape and kidnapping counts. It was submitted on behalf of the appellant that the court a quo should have given the appellant the benefit of the doubt in respect of his version and that the court erred in rejecting his version and accepting the evidence of a single witness, the complainant.

[8] It was also submitted on behalf of the appellant that the complainant was a single witness in respect of a rape charge and that the appellant's version in his testimony that he did not rape the complainants and that the intercourse was consensual should have been accepted. The appellant further testified that the actions of the complainant were

vindictive because she became jealous that he was involved with another lady who was the mother of his child who called him by in the presence of the complainant

THE STATE EVIDENCE

(a) The Complainant's evidence

[9] The complainant testified that she was walking to meet her boyfriend at night past 22h00 who was on a night shift. She testified that she had an appointment to meet with her boyfriend at the bridge to go to her boyfriend's house. She came across two male persons and offered them R30 to accompany her to Phumula. She did not know the two except by sight. As they were walking on the main road, the appellant behind her and the other taller male in front, the appellant placed a knife on her neck from behind. She was ordered to a concrete farrow where she was instructed to take off her pants and pantie. She (backed) begged the two assailants not to kill her. She complied and the two took turns to rape her with the appellant being the first one and the taller man last one. The incident took place after 22h00.

[10] After she was raped, the two assailants left her. Her white pants were soiled with dirt and so were her arms. She dressed herself up and as she was leaving the concrete tunnel, saw a police car which she stopped and told the police officers that she had been raped. She was given an option of going to the police charge office to lay the charge, but she opted to be taken to her boyfriend's home. Upon arrival at the boyfriend's home, he was not there.

[11] As she was being driven and after passing a BP Fuel Station, she saw her boyfriend disembarking his staff transport vehicle and asked the police to stop and leave her with the boyfriend. The police obliged but she disembarked the police car before it came to a complete halt. She was left with her boy-friend and immediately reported the rape to him. She confirmed to him that she knew the appellant by sight but did not know the other assailant.

[12] A taxi emerged and was flagged down. It took the two to the complainant's home at Phumula. Upon arrival at her home, she reported the rape to her mother and brother who initially did not believe her. The police were called and responded after which she

was taken to Alberton police station where she laid charges. She was subsequently taken to Germiston Hospital where a J88 form was completed. She was at all the time in the company of her boyfriend T M.

[13] She was pressed during cross-examination about the inconsistencies in her statement to the police (where she told the police officer) that she did not know who raped and her evidence that she knew the appellant by sight. She insisted that she knew the appellant by sight as he used to visit her brother's carwash but did not know his name.

[14] The complainant was challenged with the doctor's report on the J88 which stated that the complainant was eventually coherent and mentally stable. The complainant insisted that she felt hurt by the rape.

[15] She denied that she was in a love relationship with the appellant. She denied knowing anyone of his friends, especially Siyabonga. She denied ever visiting the appellant at his home in Phumula. She also denied that on the night in question the complainant was at his home. She denied that the rape was reported after the mother of his child phoned and told him that his child was sick and the appellant told the mother of his child that he would send money. The complainant denied all that was put to her because she had never been to the appellant's home and was not in relationship with him.

[16] The complainant testified that her jean was taken at the hospital and never given back to her. Under cross-examination she said she was made to lie down and her jean was wet underneath.

(b) T M's evidence

[17] The second witness to testify for the State was T M, the complainant's boyfriend. He testified that during the year 2016 when the incident took place he was employed by [...] at Roodekop. He confirmed that the complainant was his girlfriend. He denied he communicated with the complainant on the night of the incident as his phone was off.

He confirmed that his shift started at 14h00 and finished at 22h00. He used the staff bus which usually drops him at the traffic lights. He was not expecting her to come to him as his phone was off. He had a good love relationship with the complainant and was not aware that the complainant had any other boyfriend.

[18] After he was dropped off by his staff buss, he saw the complainant being followed by a police car. The complainant reported to him that she was raped. (He suggested to her that they should use the police car to which she declined). A taxi came and took them to Phumula carwash after which they went to the complainant's home and reported the rape. The police were called and came. He accompanied the complainant to the Alberton Police Station and later to Germiston Hospital.

[19] Whilst at the hospital, a police detective came and took the statement from the witness. The police detective offered them transport and he was dropped at his home well after 05h00 (in) the following morning. The detective left with the complainant.

[20] The witness denied that the complainant was emotionally coherent. He testified that he knew when the complainant was well. He observed that her clothing was soiled and that her hair was unkept. The complainant was crying and only calmed down when the police arrived at her place.

(c) Dr Carol Ramatsimela's evidence

[21] Dr. Carol Ramatsimela Maimela was the third state witness. She is a medical doctor with Master's degree in medicine. She obtained MBChB at University of Witwatersrand in 2006 and Masters degree from the same university.

[22] She examined the complainant and at 05h30 and compiled the J88 form after the incident. She could not detect any evidence of trauma with the complainant's private parts but did not exclude the event of penetration. She confirmed that the complaint reported to her that she had been raped. The witness testified that penetration could happen even if it does not cause injuries. The witness also confirmed that there was

sand between the buttocks of the complainant but that the witness was coherent and able to answer questions put her.

(d) Seargent Nonhlanhla Zulu's evidence.

[23] The fourth witness for the State was Seargent Nonhlanhla Zulu. She is based at Braamfontein Provincial Family Violence Child Protection and Sexual Offences Unit ("FVC") with 13 years' experience. She was the investigating officer in this case. She works with the unit that deals with DNA linked cases and serial rapists.

[24] She received a document marked A9. The document was received from the forensics laboratory and it informed her that there is a person of interest that needs to be investigated in Alberton reported in case 469/10/2016. The DNA found in that exhibit was also the same with the DNA that was found in Alberton under case 44/11/2016. She testified that she went to Alberton and drew the case docket 44/11/2016 to compare the samples reference and found the samples belonged to the appellant.

[25] The samples from victim of rape are kept or stored at the forensic laboratory's database. The perpetrator in case number 469/10/2016 was unknown and this was the present case which the witness was investigating at the time she was alerted of the samples in case 44/11/2016.

[26] She then followed up the information and found that the suspect in case number 469/10/2016 was the appellant who lived in Rondebult. Upon following up the information, she found the appellant in prison in Boksburg. She took his confirmation samples again to confirm whether he was really the person of interest on the current investigation. There was someone else before her who was investigating the matter. She confirmed that it was police officer Lobisi. She confirmed that all the protocols of taking the DNA were observed.

[27] The samples taken from the appellant were sent to the forensic laboratory and they came back again positive. The DNA reference sample collection kit was handed in as an exhibit to the trial court's evidence in terms of section 212 of the Criminal

Procedure Act 51 of 1977 as compiled by Warrant Officer Mosimane. This was accepted by the Defense as well.

[28] The witness testified that she did not take the complainant to the doctor and that this was done by the previous investigating officer. Under cross-examination, the witness testified that she is the current investigating officer in the Alberton CAS number 469/10. She was accompanied to prison by Sergeant Thapedi. The accused involved in case number 469/10/2016 was the appellant. She confirmed that case number 44/10/2016 was withdrawn at court as the suspects were unknown.

[29] Under cross examination, she told the trial court she saw no need to conduct the identity parade because the DNA results were conclusive that the appellant was the one who raped the complainant. The case was only reopened for further investigations after the positive DNA results linking the appellant to the rape. She gave the complainant the update and showed her the picture of the appellant upon which the complainant confirmed that she used to see the appellant at her brother's carwash.

(e) Nompumelelo Winnie Lobisi's evidence

[30] The fifth State witness was Detective Sergeant Nompumelelo Winnie Lobisi and she was with the FVC unit in Germiston at the time of the incident.

[31] She confirmed that she received an evidence collection kit related to the charges. The evidence collection kit was received from Dr Nkonso (Maimela) with serial number 15D1AB6530. The evidence collection kit was then taken to the forensic laboratory. She compiled an Acknowledgement of Receipt report. She testified that she had no knowledge of the content of the evidence collection kit.

[32] Under cross-examination, Sergeant Lobisi testified that the complainant informed her she did not know the names of the perpetrators of the rape against her but knew them by sight. The State closed its case.

THE DEFENSE EVIDENCE

(f) Bongikhaya Madikizela's evidence

[33] The Defense called the appellant to testify. He confirmed that the incident involving the complainant occurred at night. The appellant testified that he knew the complainant because he was in love relationship with her. He testified that the relationship started in December 2015 and that the people who were aware of his relationship with the complainant was his father and his friend Siyabonga Dlamini

[34] His testimony was that on the day of the incident, the complainant came to visit him around between 16h00 and 17h00. He was in a relationship with another lady, the mother of his child who called him on the phone requesting money for the child. This caused an argument between him and the complainant. He testified that the complainant terminated the relationship and left after 21h00. At that time, they had already had sexual intercourse.

[35] The appellant testified that he was arrested on another matter. The appellant could not explain why would the complainant not take the police to his home if she knew where to find him. He confirmed that he had no other evidence to prove that he was in a relationship other than what he claimed.

[36] Asked by the trial court if his friend Siyabonga Dlamini ever visited him in prison, the witness stated that Siyabonga never visited. He did not know his physical address. He stated that he could not get his father to testify because he died in 2019. The Defense closed its case.

TRIAL COURT'S ASSESSMENT OF EVIDENCE, CONVICTION AND SENTENCE

[37] After considering the evidence and the heads of arguments by the State and the Defense, the trial court found the appellant guilty of rape and kidnapping and sentenced him to life imprisonment for rape and 5 years for kidnapping the latter sentence to run concurrently with the life sentence.

ON APPEAL

Appellant's grounds of appeal

[38] It was submitted furthermore on behalf of the appellant that the trial court should have doubted the version of the complainants because:

38.1 The incident occurred at around midnight.

38.2 The complainant knew the appellant and his co-perpetrator who visited her brother, but when asked on the identity in court, she said it was at night and she could not identify the accused as the perpetrator;

38.3 The complainant said she at least saw the appellant three times a week when he visited her brother at the carwash.

38.4 The complainant said around 22h00 that evening she had communication with her boyfriend T who was working that evening and worked until 22h30. The complainant testified that by agreement they were going to meet each other at the bridge used by cars after he knocked off.

ISSUE FOR DETERMINATION

[39] The issue for determination is whether the trial court erred in convicting and sentencing the appellant.

THE LEGAL PRINCIPLES AND REASONS FOR THE JUDGMENT

[40] Although it is trite that cautionary rule regarding the evidence of a single witness is a feature of our law,¹ that the rule does not apply automatically to sexual offences.

[41] In dealing the cautionary rule in *S v Jackson*² the court held that:

“In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt- no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

[42] It is always important for court to assess the credibility of a single witness. In *S v Sauls and Others*³ the court held that:

“If a complainant was a single witness the further enquiry is whether she was credible. The evidence of a single witness must be clear and satisfactory in every material respect.”

[43] The appellant’s counsel submitted that the complainant was not credible because of the contradictions regarding the fact that she had seen the appellant visit her brother’s car wash on several occasions when she stated in court that she was not certain whether he was the perpetrator.

[44] The submission cannot in my view be sustained. The complainant testified that she knew the appellant by sight when he used to visit her brother at the carwash. She also stated that she met the appellant and his companion at the traffic light. The contradictions were not material, and the trial court correctly did not have regard to them in assessing the credibility of the complainant. I will later deal (later) with the law on this aspect.

[45] The complainant offered them money (for them) to accompany her to Phumula. They walked together using the main road with the appellant walking behind her whilst

¹ See *Van der Walt v The State* (488/09) [2010] ZASCA (23 March 2010)

² 1998 (1) SACR 470 (SCA) at 476 E – F.

³ 1981 (3) SACR 172 (A) at 173

the taller perpetrator walked in front of her. One of them stated he knew her from her brother's carwash by sight. The complainant was not certain who of the two knew her. She testified that the appellant produced a knife and placed it on her neck from behind.

[46] If indeed there was consent for sexual intercourse it is highly unlikely that the complainant would have flagged the police for assistance, failed to inform the police who her assailant was. It is also highly unlikely that as claimed by the appellant that the complainant knew where he stayed, she would have failed to take the police to the appellant's home.

[47] Having considered the record, I find no basis for the suggestion that the trial court erred in not giving the appellant the benefit of the doubt that he had a relationship with the complainant.

[48] The trial court was alive to the cautionary rule in respect of the evidence of a single witness and this is apparent from the judgment where the trial court made (under) the following remarks at page 280 of the record:

"It is worth noting from the outset that Ms K is a single witness regarding the events surrounding how she was accosted by her assailants and the subsequent rape incidents. In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused person may be convicted of any offence on the single evidence of any competent witness.

It is a well-established judicial practice that the evidence of a single witness should be approached with caution. Her merits as a witness being weighed against her credibility. It must not only be credible but must also be reliable."

[49] Having regard to the trial courts application of the cautionary rule regarding the evidence of a single witness, it is my considered view that the court correctly convicted the appellant as charged. The submission made on behalf of the appellant that the trial court erred is without merit and is rejected.

[50] As regards the submission that there was contradiction in the evidence of the complainant which the trial court ought to have considered and given the appellant the

benefit of doubt, by rejecting the complainant's evidence the law on this point is settled. In *S v Mkohle*⁴ the court held that:

"Contradictions per se do not lead to the rejection of a witness' evidence ... They may simply be indicative of an error. (*S v Oosthuizen* 1982 (3) SA 571 (T) quoting from 576 G –H:

"And it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance, their bearing on the parts of the witness evidence."

[51] The complainant made a report of the rape to her boyfriend at the first reasonable opportunity without being forced. She was in a state of panic and crying. She only calmed down when the police came to her house and the time she arrived at the hospital for examination and completion of the J88 form, she was calm enough to answer the questions correctly. Her evidence about the rape was corroborated by her boyfriend T as the first person report. I have not found any material contradictions with her evidence and that of her boyfriend. There is therefore no basis for submitting that the trial court ought to have had regard to the contradictions and reject the complainant's evidence.

[52] The appellant could not support his version that he was in a relationship with the complainant. He did little to assist the trial court to give him the benefit of doubt as he did not know where his friend, Siyabonga Dlamini, stayed who according to the appellant, he could (not) corroborate his claim of relationship with the complainant. Our law does not require a person accused of an offence to prove his innocence but simply to give an explanation that is reasonably possibly true. The court faced with such version will assess, after considering the totality of the evidence before it, whether the version is reasonably possibly true or whether it can be rejected out of hand.

[53] The complainant, after the rape, had soiled pants. She had sand in her buttocks and although no trauma was detected in her private parts, that did not exclude the non-

⁴ 1990 (1) SACR 95 (A) at 98F-G

consensual intercourse. The trial court, in my respectful view, correctly found that there was no truth in the claim made by the appellant that the intercourse was consensual and correctly rejected the appellant's defense. She was taken, at a knife point, against her will to a concrete tunnel where she was sexually assaulted by two assailants one of which has not been apprehended.

[54] The approach dealing with the evidence that the crime was committed by more than one person revolves on the doctrine of common purpose. This doctrine is defined as follows:⁵

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.”

[55] The Constitutional Court has held that the doctrine of common purpose can and should be extended to common law crime of rape. In other words, it is not necessary for the State to prove that all participants in the crime physically penetrated the private parts of the victim. As long as that the State is able to adduce evidence that for instance, one of the perpetrators restrained the victim whilst another one raped her, it is enough to prove common purpose to commit the crime.⁶

[56] It is therefore now settled that:

“The instrumentality argument has no place in our modern society founded upon the Bill of Rights. It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room. The perpetrators overpowered their victims by intimidation and assault. The manner in which the applicants and the other co–accused moved from one household to the other indicates meticulous prior planning and preparation. They made sure that any attempt to escape would not be possible.”⁷

⁵ Burchell: Principles of Criminal Law 5ed (Juta, Cape Town 2016) at 477)

⁶ See: *Ntuli v The State* (CCT 323/18: CCT69/19) [2019] ZACC 48 ;2020 (2) SACR 38; 2020(5) SA 1 (CC) at para 54)

⁷ See *Ntuli v The State* above at n (6) para 54

[57] Having considered the record and the evidence led, there is no basis for this court to interfere with the guilty verdict reached by the trial court on both counts.

[58] As regards sentence, it is trite that the sentencing is in the discretion of the trial court and the court of appeal may only interfere if the discretion on sentence was not judicially and properly exercised.⁸

[59] The sentence imposed by the trial court was, in my view, correctly imposed as there is no evidence of irregularity committed by it. On the rape count, the sentence imposed is the minimum sentence prescribed by section 51(1) of the Criminal Law Amendment Act 105 of 1997, which is life imprisonment. The complainant was raped by more than one assailant.

[60] The Constitutional Court in *Ntuli v The State*⁹ restated the law on minimum sentence and Mathopo AJ (as he then was) held as follows:

“I interpose to say that in 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law Amendment Act 105 of 1997 which prescribes minimum sentences for certain specified serious offences. The Government’s intention was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality^[36] and the right to human dignity,^[37] we are still grappling with what is a scourge in our nation.”

⁸ See *S v Rabie* 1975 (4) SA 855 (A) at 857 D-E; *S v Salzwedel and Other* 1999 (2) SACR 586 (SCA) at 591.

⁹ (4) (CCT323/18; CCT69/19) [2019] ZACC 48; 2020(2) SACR 38(CC); 2020 (5) SA (1)(CC)

[61] The aggravating and mitigating factors in sentencing must be weighed upon cumulatively by the sentencing court to determine whether substantial and compelling circumstances exist.¹⁰ In *S v Vilikazi*¹¹ it was held that:

“...in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background...”

[62] Commenting on sentence the court in *S v Mahonotsa*¹² held that:

“There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and therewith always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty possible. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.”

[63] It is also a principle of our law that in sentencing, each case must be decided on its own merits.¹³ The sentence must always be individualized, for punishment must always fit the crime, the offender, and the circumstances of the case.

[64] It is equally important that one of the factors to be considered in sentencing is whether there are substantial and compelling circumstances in each case under consideration.¹⁴ The period spent in custody before sentencing on its own does not constitute substantial and compelling circumstance.

[65] The following aggravating circumstances are present in this case:

- (a) The seriousness of the offence and the fact that the complainant was 19 years old when the offence was committed.
- (b) The complainant was raped by two people.
- (c) A knife was used

¹⁰ See *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 53.

¹¹ 2009 (1) SACR 552 (SCA) at 574 par [58]

¹² 2002 (2) SACR 435 at 444 par [19]

¹³ See *S v SMM* 2013 (3) SACR 292 (SCA) at para [13]

¹⁴ See *S v Radebe* 2013 (2) SACR 165 (SCA).

(d) The high prevalence of the offence.

(e) The appellant showed no remorse.

[66] There was no compelling circumstances that we find the trial court ignored.

[67] As regards the kidnapping charge, a knife was used, and the complainant was forced into a concrete tunnel by two assailants. Although there is no minimum sentence prescribed for kidnapping to interfere with the trial court sentencing on the charge.

ORDER

[68] The following order is made:

(a) The appeal on conviction and sentencing is dismissed.

**M.L. SENYATSI
JUDGE OF THE HIGH COURT**

I agree :

**M. TWALA
JUDGE OF THE HIGH COURT**

Heard:

3 February 2022

Judgment: 17 June 2022
Counsel for Appellant: Adv J. Henzen – Du Toit
Instructed by: Legal Aid South Africa
Counsel for First Respondents: Adv R. Ndou
Instructed by: Office of the Director of Public Prosecutions