

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



Appeal No.:A68/2022

DPP Ref No: 10/2/5/1-(2022/041)

Date of Appeal: 13 March 2023

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

DATE

SIGNATURE

In the matter between:

RAKGALANE, JAN

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Rakgalane Jan v The State* (A68/2022) [2023] ZAGPJHC
555 (23 May 2023)

JUDGMENT

Karam AJ:

INTRODUCTION

1. The appellant was convicted in the Germiston Regional Court of:

count 1 – common assault;

count 2 – rape, read with the provisions of the Section 51(2) of Criminal Law Amendment Act 105 of 1997 (“the minimum sentence legislation”);

count 3 – kidnapping; and

count 4 – rape, read with the provisions of the Section 51(1) the minimum sentence legislation.

2. He was sentenced to an effective term of life imprisonment.

3. The matter comes before this Court on an automatic right to appeal, the appellant having been sentenced to life imprisonment.

THE EVIDENCE

4. The complainant testified that she became aware of a job opportunity in Gauteng pursuant

to her becoming aware of same from the appellant’s Facebook page. She

communicated

with the appellant telephonically and he confirmed the veracity of the employment opportunity to both the complainant and her mother. As the appellant had advised her that

she was required to commence her employment the very next day, the complainant borrowed taxi fare from her mother and travelled to Gauteng.

4.1 The appellant met her at the taxi rank. She enquired from him as to where the store was where she was to work and he responded that it was near to where she was to reside. He then escorted her to a shack where she was to reside. There was nothing therein, not even solid flooring. Again enquiring from him as to where the store was, he replied that it was near where she had disembarked from the taxi. She confronted him with the contradiction as to what he had earlier stated. She then received a call on her cellular telephone from her mother enquiring as to whether she had arrived. The appellant instructed her to tell her mother that she had arrived, and then removed her cellular telephone from her. She then attempted to flee but the appellant grabbed her, assaulted her with open hands and forced her into another shack on the same premises. He thereupon ordered her to undress. When she refused, he assaulted her further and forcibly removing her clothing, he raped her. Thereafter, he left the shack, locking her therein.

4.2 Finding her cellular telephone on the shack floor, she communicated with her uncle and advised him as to what had transpired. Being unfamiliar with the area, she was unable to advise him as to her location. He requested her to look for something to assist in determining her location and she discovered the appellant's wallet with his

identity card and a bank card. She related what was on the identity card to her uncle. He advised her that the family name appeared familiar and that he would attempt to trace the appellant through the appellant's family at his hometown.

4.3 He and the complainant communicated until she heard the appellant returning to the shack at approximately 2h00. Upon his return, the appellant raped her again, and again at 4h00. He did not use a condom on any occasion. At approximately 8h30, there was a knock on the shack door and the appellant left the shack for several minutes. When he returned, he shouted at the complainant for notifying the police, stating that he had been informed that the police were looking for him in Limpopo. He ordered her to take her belongings and leave.

4.4 Upon leaving the shack, the complainant enquired from a stranger on the street as to the whereabouts of the police station and proceeded thereto and reported the incident. She returned to the shack with police officers but the appellant was not present. They subsequently returned to the police station and she was then taken to the doctor and examined. On one of the occasions that the appellant contacted her after the incident, he apologized to her for his actions.

5. The Appellant's mother testified and confirmed her telephonic conversation with the Appellant wherein he had advised her as to the authenticity of the job and provided her with details pertaining thereto.

6. Mr Samuel Masui testified. He is the complainant's uncle and is a police officer. He Confirmed the complainant's evidence in material respects, particularly with regard

to their telephonic communication from 22h00 the relevant evening until 2h00 the following morning.

7. Ms Poshoko testified. She is a professional nurse with 8 years experience. She examined the complainant. There were no physical injuries but there were injuries to her genitalia, consistent with rape. She took samples/swabs for forensic investigation.
8. Warrant Officer Mokwena testified. At approximately 9h00 on 22 July 2018, the Complainant entered the police station and reported the incident. He confirmed that he proceeded with his colleagues and the complainant to the shack where the incident had allegedly taken place. The shack was locked and he kicked open the door. The complainant showed him the glass they had drunk from and the appellant's identity card. He removed these items and booked same into the SAP 13 register.
9. The remaining witnesses who testified for the State were formal witnesses who testified to the chain regarding the collection and dispatch of the complainant's sexual crime kit to the forensic science laboratory in Pretoria.
10. The Appellant testified. He stated that having placed his photograph and contact details on his Facebook page, he and the complainant communicated and the complainant was desirous of them meeting. On the morning of 21 July 2018 she contacted him, requesting transport fare from him in order that she travel to Johannesburg to meet him. He advised her to wait until he receives his salary. Not wishing to wait, the complainant devised a scheme regarding employment whereby she could obtain transport monies from her mother. Part of her plan was that he speak to her mother

and reassure her as to the veracity of such employment. The appellant complied with the complainant's request.

10.1 The appellant then gave the complainant directions and he met her on her arrival. They hugged and kissed and he carried her bags to his shack. Upon arrival at his shack, they conversed with each other and he informed her that he has a child and is no longer in a relationship with his child's mother. The complainant, similarly, shared her personal information with him.

10.2 After having consensual sexual intercourse, the appellant left to buy them food, not locking the shack and leaving his cellular telephone and identity document there. Upon his return, the complainant angrily threw his cellular telephone at him, advising him that some woman had called him and accusing him of cheating on her, that is the complainant. He could not placate the complainant and advised her that he is going to sleep and that she can join him when she is ready. The complainant later joined him and they slept. No further sexual intercourse took place.

10.3 In the morning, his friend came to the shack enquiring from him why his cellular telephone was switched off and advised him that his family were attempting to reach him regarding rape allegations. When the complainant woke up, she asked him for taxi fare, advising him that she was going to Pretoria. He offered her R200,00 but she refused to accept that, wanting more. He then escorted her to the taxi rank.

10.4 He and the complainant were in a love relationship. They had commenced communicating online since 1 July 2018. He denied all the allegations and stated

that on the one occasion that they had had sexual intercourse, same was consensual.

ISSUES ON APPEAL

11. The issues to be determined on conviction are whether the trial court erred in finding that the State had proved its case beyond reasonable doubt and in not finding the appellant's version to be reasonably possibly true, and on sentence, whether the trial court erred in not finding substantial and compelling circumstances warranting a departure from the imposition of the prescribed minimum sentences.

LAW AND ANALYSIS

12. It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the **proven** guilty are convicted. It is further trite that the Court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a common sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt.

S v Hadebe & Others 1998 (1) SACR 422 (SCA)

S v Van Der Meyden 1999 (1) SACR 447 (SCA)

S v Phallo & Others 1999 (2) SACR 558 (SCA)

S v Van Aswegen 2001 (2) SACR 97 (SCA)

S v Shackel 2001 (2) SACR 185 (SCA)

S v Chabalala 2003 (1) SACR 134 (SCA)

AD CONVICTION

13. The complainant was a single witness to all of the aforesaid counts.

13.1 It is trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.

R v Mokoena 1932 OPD 79

S v Webber 1971 (3) SA 754 (A)

S v Sauls & Others 1981 (3) SA

S v Stevens 2005 1 All SA 1

S v Gentle 2005 (1) SACR 420 (SCA)

Section 208 of the Criminal Procedure Act 51 of 1977

13.2 Indeed, she was an impressive witness. She was cross examined extensively and nothing material emanated therefrom. Her evidence was corroborated materially by the independent medical evidence. It was further corroborated in material respects by her mother and, in particular, by her uncle.

13.3 The complainant, at her first available opportunity, contacted her uncle and informed him as to what had transpired. On being released by the appellant,

she immediately proceeded to the police station to report the matter. Her conduct in this regard is consistent with what had befallen her.

13.4 On an evaluation of the evidence, I am of the view that the complainant overwhelmingly satisfied the aforesaid test of a single witness and I have no hesitation in finding that the learned Magistrate correctly accepted her evidence as such.

14. Contrary to the complainant, the appellant was an unimpressive witness and his evidence was characterised by vagueness and improbability.

14.1 On his version, the complainant, living in a different province, having a child from a previous relationship and currently having a steady boyfriend, became obsessed by his apparent good looks. Desirous of being with him, she concocted a false version of securing employment in Gauteng and borrowing transport monies from her mother, not being amenable to waiting for the appellant to send her transport monies, she travelled to Gauteng. She and the appellant engaged once in consensual sexual intercourse. The complainant, becoming enraged by an alleged telephone call from the mother of the appellant's child, decided to leave.

14.2 His version is implausible for, inter alia, the following reasons:

14.2.1 Both the complainant and the appellant were aware that they each had a child from prior relationships.

14.2.2 The evidence of the complainant that this alleged conversation never occurred. The appellant had taken his cellular telephone with him when he had locked her in the shack and left, after the first rape.

14.2.3 It is highly improbable that after getting what she travelled here for, namely intimacy with the appellant, she would call her uncle late at night and report the kidnapping and first rape to him.

14.2.4 It is highly improbable that she would have sustained the injuries to her genitalia were the admitted one session of sexual intercourse, consensual.

14.2.5 Whilst this Court is well acquainted and familiar with false allegations of rape in the context of the adage "hell hath no fury like a woman scorned", it is highly improbable that the complainant, an adult woman with a child, would concoct such a version, lie to her mother that she was coming to Gauteng for a job interview, and then, having obtained what she had sought namely intimacy with the appellant, proceed to lay rape and other charges against him simply because of an alleged telephone call.

15. Having regard to all of the aforesaid, I am of the view that the learned Magistrate correctly convicted the Appellant, finding that his version was not reasonably possibly true, and that there is no merit in the appeal on conviction.

AD SENTENCE

16. The appellant was sentenced as follows:
count 1 – 1 year imprisonment;

count 2 – 10 years imprisonment;

count 3 – 5 years imprisonment; and

count 4 – life imprisonment.

Ex lege, the effective sentence is life imprisonment.

17. The locus classicus on the issue of substantial and compelling circumstances is the decision of **S v Malgas 2001 (2) SA 1222 (SCA)** wherein it was stated that the prescribed minimum sentences are not to be departed from lightly or flimsy reasons and not unless there are truly convincing reasons to do so.

18. In this matter, the aggravating circumstances far outweigh the mitigating factors:

18.1 The complainant was falsely lured to Gauteng on the pretext that she would secure employment. This is aggravating, given the grave economic climate and shocking rates of unemployment in our country, particularly among young people. It is evident that the offences were premeditated and planned.

18.2 The appellant's absolute lack of remorse. It is evident that the Appellant's strategy was that after having been linked by DNA, he would admit to having had one session of consensual intercourse and thereby attempt to escape Section 51(1) of

the minimum sentence provisions. Whilst he was charged and convicted of two counts of rape, the evidence reveals that the Complainant was raped three times. But for the actions of the uncle in having the appellant know that the police were looking for him, it is unclear how much longer the complainant would have been further deprived of her freedom and how many times further she would have been raped.

19. I am of the view that the learned Magistrate, considering all the mitigating and aggravating factors, correctly found that there were no substantial and compelling circumstances warranting a departure from the prescribed minimum sentences on counts 2 and 4.

I am further satisfied of the propriety of the other sentences and am of the view that there is no merit in the appeal against sentence.

20. In the circumstances I propose the following Order:

- 20.1 The appeal against both conviction and sentence is dismissed.

WA KARAM

ACTING JUDGE OF THE HIGH COURT

I AGREE

G ALLY

ACTING JUDGE OF THE HIGH COURT

Appearances:

Date of hearing: 13 March 2023

Date of Judgment: 23 May 2023

APPELLANT: Adv LL Makoko
Legal Aid SA
Johannesburg Office

RESPONDENT: Adv MM Phaladi
Director of Public Prosecutions
Gauteng Local Division