

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A99/2016

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

Date: 17 June 2022 E van der
Schvff

In the matter between:

S M LATAKGOMO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Van der Schvff J (Neukircher J concurring)

Introduction

[1] The appellant was convicted in the Regional Court in Cullinan on three counts of rape in contravention of section 3 of Act 32 of 2007 and one count of kidnapping. He was represented during the trial. He pleaded not guilty. He was convicted and

sentenced on 18 November 2009 to life imprisonment. The appellant has an automatic right of leave to appeal against the conviction and sentence.

- [2] The appeal was previously removed from the roll because the record was incomplete, and again for finalisation of the reconstruction. When this court heard the matter, the record was reconstructed, and neither party raised any further issues in this regard. In our view, the available record was sufficiently reconstructed for the court to adjudicate the appeal.

The central issue for determination and legal matrix

- [3] The central issue for determination in this appeal is whether the trial court erred in finding that the State proved beyond a reasonable doubt that sexual intercourse occurred between the appellant and the complainant without the latter's consent. This issue must be determined, considering the fundamental presumption that every person accused of a crime is considered innocent until proven guilty. The test was articulated succinctly in *S v Van der Meyden*:¹

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

- [4] It is likewise a foundational principle that:

'It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether

¹ 1999 (1) SACR 447 (W) at 449J-450B.

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.¹²

[5] In *S v Chabalala*³ the Supreme Court of Appeal set out the approach to follow when the evidence is evaluated in a criminal trial:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'

[6] When considering a matter on appeal, the appeal court has to be mindful that it is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or an examination of the record reveals that those findings are patently wrong.⁴ As a result, this court's power to interfere with the findings of fact of the trial court is limited. The Supreme Court of Appeal explained in *S v Monyane and Others*⁵ that 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.

² *S v V* 2000 (1) SACR 453 (SCA) par [3].

³ 2003 (1) SACR 134 (SCA) par [15].

⁴ *S v Francis* 1991 (1) SACR 198 (A) at 198J-199A.

⁵ 2008 (1) SACR 543 (SCA) at par [15].

[7] When the sentence imposed by a trial court is considered on appeal, the court of appeal must remain alive to the fact that sentencing falls pre-eminently within the jurisdiction of the sentencing court. The Supreme Court of Appeal in *Botha v The State*⁶ recently confirmed the trite principle that three guiding principles must be considered collectively in determining an appropriate sentence. These principles, also known as the 'triad of Zinn', include the gravity of the offense, the offender's circumstances, and the public interest. An appeal court is only to interfere with a sentence imposed where such a sentence is disturbingly inappropriate or vitiated by misdirection of a nature that indicates that the trial court did not exercise its discretion reasonably.⁷ Where a particular criminal offense carries a prescribed minimum sentence, the prescribed minimum sentence is not to be departed from lightly and for flimsy reasons.⁸ Where a trial court imposed the prescribed minimum sentence, the appeal court must find substantial and compelling circumstances justifying the imposition of a lesser sentence that escaped the trial court's attention.

The appeal

Ad conviction

[8] In the notice of appeal, the appellant avers that the court erred in making the following findings:

- i. that the State proved the guilt of the appellant beyond a reasonable doubt;
- ii. that there are no improbabilities in the State's version;
- iii. that the evidence of the State witness can be criticised on matters of detail only, whereas the evidence was contradictory in material respects;
- iv. that the minor differences between the evidence of the appellant and the defence witness were sufficient to reject the appellant's evidence;
- v. rejecting the evidence of the appellant as not being reasonably possibly true;
- vi. accepting the evidence of the state witnesses;

⁶ (546/2021) [2011] ZASCA 87 (8 June 2022) at par [10].

⁷ *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G.

⁸ *S v Malgas* 2001 (1) SACR 469 (SCA).

- vii. holding against the appellant contradictions between his own evidence and the facts put to the witnesses in cross-examination;
- viii. holding against the appellant matters which were not put to witnesses; and
- ix. giving importance to minor discrepancies between defence witnesses.

[9] He then asserts that the court erred in failing to:

- i. properly analyse or evaluate the evidence of state witnesses; and
- ii. properly consider the improbabilities inherent in the state's version.

[10] In addition, the appellant noted the following grounds of appeal against the conviction

by inserting in his handwriting on that notice that:

- i. there were no eyewitnesses to the alleged rape, and he was not arrested during the commissioning of the alleged crimes;
- ii. there is no forensic evidence that would prove that he raped the complainant;
- iii. the attorney did not cross-examine the complainant properly; and
- iv. the state did not prove beyond a reasonable doubt that he raped the complainant.

[11] During argument, counsel for the appellant submitted that the learned Regional Court Magistrate (the magistrate) erred during the evaluation of the complainant's evidence in that he failed to approach the evidence of the single witness with the necessary caution. Although s 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted on the evidence of a single competent witness, it is a well-established judicial principle that the evidence of a single witness should be approached with caution. Counsel further submitted that the magistrate erred in rejecting the appellant's version.

[12] Counsel for the appellant submitted that - regarding what occurred in the appellant's bedroom - only the appellant and the complainant could inform the

court of what transpired. It is common cause that the appellant and the complainant engaged in sexual intercourse on more than one occasion during the period in question. The appellant testified that the complainant accepted his love proposal and initiated the sex in his room. The complainant testified that she had no interest in a love relationship with the appellant since she was already in a relationship with her child's father. She accompanied the appellant to the farm where he worked because he said there was an employment opportunity for her.

The magistrate's ex tempore judgment

[13] The magistrate dealt comprehensively with the evidence presented by each of the witnesses and then evaluated the evidence. He stated that the complainant's evidence was that, after the appellant had sexual intercourse with her against her will on three separate occasions over the weekend in question, she asked the appellant to take her home to see her child. The appellant's version was that the complainant was in love with him, that the sexual intercourse was initiated at her insistence and that she insisted on sleeping in his bed, even during the first night when her child was still with her. He also testified that he had R150.00 and that the complainant wanted the money, but that he told her to be patient and that he would give it to her later. He testified that he told the complainant that they would go to the mall the next week and that he would give her the money there. She would then be able to buy everything that she needs.

[14] The learned magistrate held that he found the complainant's conduct when they arrived at her home on Monday strange if considered in the context portrayed by the appellant. It is common cause that when they arrived at her home on Monday, the complainant immediately went to the toilet and did not come back. The appellant went to the toilet to fetch her when he wanted to leave, but she called for her stepfather. The complainant and her stepfather talked while the appellant was outside. The complainant then came out and informed him that she was not returning with him because her child was too young and she was breastfeeding. The magistrate considered whether the complainant's conduct on the Monday

could be reconciled with the appellant's evidence. By stating that he found her conduct 'strange' in light of the appellant's evidence, he expressed the view that he found the appellant's version improbable.

[15] The learned magistrate found that the appellant's version that this young woman who is in love with him, who insists on sexual intercourse to the extent that she even wakes him during the night to have intercourse, who is promised money and an employment opportunity, refuses to accompany him back out of the blue and lays a false charge against him, is not reasonably possibly true.

[16] The appellant testified, or as the magistrate put it, bragged, that he also had a love relationship with the complainant's mother. The complainant's mother was called as a defence witness, but she did not corroborate the appellant's evidence. She denied the existence of any love relationship between them. The magistrate then correctly rejected the appellant's version on this aspect.

[17] The magistrate considered that a weak aspect of the state's case was that there was no medical evidence to corroborate the complainant's version but given that the investigating officer could not get hold of the doctor because she was abroad in Ireland, this was not a bar to the State's case.

[18] We cannot fault the magistrate's finding that the State proved the appellant's guilt beyond a reasonable doubt. Although not referred to by the magistrate in his *ex tempore* judgment, crucial evidence was not put to the complainant when she was cross-examined. The most pertinent hereof is the evidence that the complainant commenced cleaning the employer's house during her visit to the farm and, amongst others, used the vacuum cleaner. During cross-examination, the appellant initially stated that the complainant met Mr. Claasen's wife but later recanted this statement. Another discrepancy in the appellant's version is that he stated in his bail application that the complainant asked him for R150 for milk for her son because she did not want to breastfeed him anymore. He informed her

that he would be in a position to give her money during the weekend. This version does not correspond with his evidence about the R150 when cross-examined during the trial and he did not mention the issue of money during his evidence in chief.

[19] As for the contention that the complainant could have informed the appellant's co-employee that she was held against her will and raped because he entered the appellant's dwelling to charge his cell phone, the appellant's evidence refutes this. The appellant testified that his co-employee entered his house on the Saturday morning before the complainant took her child back home. On both the appellant and the complainant's evidence, the intercourse occurred when they returned after leaving the child with its maternal grandmother.

[20] The complainant's evidence regarding her return to the home was corroborated by her stepfather. The inconsistency between the complainant's evidence and her father's evidence regarding the sequence of events after the appellant left the complainant's homestead is immaterial and has no bearing on a finding regarding whether the complainant was raped. The stepfather confirms that: the complainant went to the toilet when she arrived home on Monday and remained there until the appellant went to fetch her when he wanted to leave; that she then called him and informed him that she did not want to return with the appellant; that she informed him that the appellant had raped her and that he did not confront the appellant at that stage because he feared that he would endanger the complainant's life or that the appellant would flee.

[21] After considering the record, we are of the view that the magistrate did not misdirect himself when he analysed and considered the evidence presented to the court. We are satisfied that the magistrate was correct in finding that the state proved the appellant's guilt beyond a reasonable doubt.

Ad sentence

- [22] The appellant noted the following grounds of appeal against the sentence:
- i. the sentence is shocking and disproportionate to the facts of the case;
 - ii the learned Regional Court magistrate over-emphasized the interests of society when imposing a sentence of life imprisonment;
 - iii although the crimes are of extreme serious nature, it does not justify a sentence of life imprisonment; and
 - iv the complainant suffered no injuries during the rape.

[23] In determining an appropriate sentence, the magistrate considered the appellant's personal circumstances being: his age, that he passed grade 12, was working on a game farm, is the father of two minor children and that he has two previous convictions for manslaughter and housebreaking with the intention to steal and theft, respectively. The court considered the complainant's circumstances, the nature of the crime and its prevalence in the area of the court's jurisdiction. The magistrate also considered that the appellant's legal representative conceded that no substantial and compelling circumstances exist that would justify a deviation from the prescribed minimum sentences. However, he requested the court to order that the sentences run concurrently. The state raised aggravating circumstances and submitted that the defenseless complainant was assaulted and raped multiple times. She relied on the appellant for an employment opportunity, and he betrayed her trust. The record reflects that the court was adjourned during the complainant's testimony because she was crying too much. The magistrate agreed that no substantial and compelling circumstances exist that would justify a deviation from the prescribed minimum sentence. He took all the counts together for purposes of sentencing and imposed a sentence of lifelong imprisonment. The magistrate's approach cannot be faulted.

Miscellaneous

[24] The appellant raised, as a ground of appeal, that his attorney did not cross-examine the complainant properly. This ground of appeal was not substantiated

and stood as a bare statement. We agree with Kubushi J, who stated in *Ramonyathi v The State*⁹ that incompetent lawyering can wreck a trial and violate an accused's fair trial right. However, a proper case needs to be made out in this regard. An appellant relying on inadequate legal representation as a ground of appeal will need to show that his legal representative was incompetent and that the incompetence led to identifiable issues in the trial, which renders the conviction appealable. There is no evidence of this in the matter before us. This ground of appeal, therefore, has no merit and must be rejected.

ORDER

In the result, the appeal against the conviction and sentence stands to be dismissed, and the following order is granted:

- 1. The appeal against the conviction and sentence is dismissed.**

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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| For the appellant: | Mr. H. L. Alberts |
| Instructed by: | Legal Aid South-Africa |
| For the respondent: | Ms. Harmzen |
| Instructed by: | State Attorney |
| Date of the hearing: | 14 April 2022 |
| Date of judgment: | 17 June 2022 |

⁹ (A470/2014) [2014] ZAGPPHC 915 (23 October 2014) at par [6].