REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 08/09/2023

SIGNATURE:

CASE NO: A222/2022

In the matter between:

BONGANI KHOZA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Barit AJ

Introduction

[1] This is an appeal against a conviction and sentence by the Tsakane Regional Court presided over by Ms. Makamu. The appellant, Bongani Khoza, is a thirty-eight-year-old married male, who is currently serving time with respect to this conviction and sentence.

[2] The appellant, has launched this appeal with respect to both conviction and sentence.

(a) Firstly, it is a submission of the appellant that the State has not proved its case “beyond a reasonable doubt” and the conviction ought to be set aside.

(b) Secondly, that life imprisonment is strikingly “disproportionate to the facts” of the case, and ought to be set aside and to be replaced with a suitable sentence.

[3] The respondent (the State) has submitted that the appeal against conviction and sentence ought to be dismissed.

[4] The appellant, Bongani Khoza, was legally represented throughout the trial. At the start of the proceedings in the regional court, it was explained to the appellant by the magistrate what the competent sentences were with respect to the offences he was alleged to have committed. This included a minimum sentence of life imprisonment for rape in terms of legislation. The appellant then pleaded not guilty to

all the three charges, namely rape; attempted murder; and robbery with aggravating circumstances.

The Conviction And Sentence

[5] On 6 June 2022 the appellant was convicted (at the Tsakane Regional Court) on the following charges:

(a) Count 1. – Rape: - read with the provisions of Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentences Act").

(b) Count 2. – Attempted Murder, and;

(c) Count 3. – Robbery with Aggravating Circumstances: - read with Section 51 (2) of the Minimum Sentences Act.

[6] On the 10th August 2022 the appellant was sentenced as follows:

(a) Count 1. - To life imprisonment;

(b) Count 2. – To ten years imprisonment; and

(c) Count 3. – To fifteen years imprisonment.

The sentences were ordered to run concurrently.

Further the appellant was declared unfit to possess a firearm in terms of Section 103 (1) of Firearms Control Act 60 of 2000.

Grounds Of The Appeal

[7] The grounds of the appeal to this court, are basically as follows:

(a) With respect to the conviction, the appellant maintains that no rape took place but merely sexual intercourse which was consensual. In addition, the appellant states that the complainant, who is a single witness in the matter, failed to call any witness to support her version. The main thrust of this being that there has been a factor of mistaken identity, namely that the appellant was not the perpetrator of the offences.

(b) With respect to sentence, the appellant maintains that personal circumstances dictate that a life sentence should not have been imposed on him. Further that the "cumulative effect" of his personal family circumstances show substantial and compelling circumstances for such a life sentence not to have been imposed.

[8] The appellant had an automatic Right of Appeal in terms of Section 10 of the Judicial Matters Amendment Act 42 of 2013. The appellant is appealing against both convictions and sentences, and has given Legal Aid South Africa instructions to prosecute his appeal.[1]

Legal Background Re Appeals

[9] In the case of *R v Dhlumayo and Another,* [2] the appeal court stated:

> *"The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing the demeanour, but also their appearances and whole personality. This should not be overlooked".*

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[1] *Judicial Matters Amendment Act 42 of 2013. Section 10: …"If that person was sentenced to imprisonment for life by a regional court… he or she may note such an appeal without having to apply for leave in terms of Section 309 B".*

[2] *R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705*

[10] In *A M and Another v MEC Health, Western Cape* [3], Wallis J A said at para 8:

> *"In Makate v Vodacom (Pty) Ltd the Constitutional Court, reaffirmed the trite principles outlined in Dhlumayo, quoting the following dictum of Lord Wright in Powell and Wife v Streatham Nursing Home"* [4]:
>
> *"Not having seen the witnesses puts the appellant judges in a permanent position of disadvantage against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the Higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case".*

[11] The court of appeal, if it is convinced that the assessment is wrong, will only then reject the trial courts assessment of the evidence. If the appeal court is in doubt, the trial court's judgment must remain in place.[5] From the above it can be seen that an appeal court must be careful in making decisions, which are purely based on paper and representations in court without the presence of the parties in the actual case[6].

[12] In the appeal court matter *S v Kebana* [7] it was stated:

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[3] *A M and Another v MEC Health, Western Cape (1258/2018) 2020 ZASCA 89 (para 8)*

[4] *Powell and Wife v Streatham Nursing Home 1935 AC 243 at 265:*

[5] *S v Robinson 1968 (1) SA 666 (A) at 675 H. Here the Trial Court was said to be much more in a favourable position than the Court of Appeal, to make factual and credibility findings.*

[6] *See Bernert v ABSA Bank Ltd [2010] ZACC 28; 2011 (3) SA 92 CC at para 106: "The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word". The main advantage being the opportunity to observe the demeanour of the witnesses".*

[7] *S v Kebana [2010] 1 all SA 310 (SCA) para 12.*

"It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings".

Conviction – The Law

[13] It is trite law that the onus of proof rests with the State to prove the guilt of an accused beyond reasonable doubt. If the accused's version is only reasonably possibly true, he would be entitled to an acquittal. The Supreme Court of Appeal in the matter of *Shackle v S* [8] stated:

> *"The 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 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 that it will be so improbable that it cannot be reasonably possibly true".*

In *S v Munyai* [9] AJ Van der Spuy stated:

[8] *Shackle v S 2001 (1) SACR 279 (SCA) at 288 E-F.*
[9] *S v Munyai 1988 (4) SA 712 at 915 G.*

"A court must investigate the defence case with the view of discerning whether it is demonstratable false or inherently so improbable as to be rejected as false".

[14] Heher AJA in the matter of *S v Chabalala* [10] said:

"The correct approach is to weigh up all the elements which points 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

[15] In the matter of *S v Sithole and Others* [11] it was stated:

"There is only one test in a criminal case and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that the accused is entitled to an acquittal if there is a

[10] *S v Chabalala 2003 (1) SACR 134 (SCA) at page 140 A-B.*
[11] *S v Sithole and Others 1999 (1) SACR 585 W at 590*

reasonable possibility that there is an innocent explanation which he has proffered might be true".

[16] A court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.

[17] Ponnan JA in the case of *S v Monyane and Others* [12] stated:

> *"This court's powers to interfere on appeal with the findings of fact of a trial court are limited… 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 (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f)."*

The Facts

[18] At the start of the trial at the court a quo, the appellant denied having committed the offences. He maintained that he had a love relationship with the complainant and that the sexual intercourse was consensual.

[19] The complainant, a single witness in the matter, did not call any witnesses to support her version. She denied being in love with the appellant. Her evidence was that on the evening of 25 December 2018, she was on her way in the road. She and

[12] *S v Monyane and Others 2001 (1) SACR 543 (SCA) at para 15. See also S v Francis 1991 (1) SACR 198 (A) at 198 J – 199 A.*

the appellant met there for the first time. She and the appellant had no prior conversations between themselves. The complainant alleges that the appellant demanded money from her, and then proceeded to rob, rape, choke and assault her. The appellant and the complainant, living in the same street (Pedie street) though some distance between where they lived, had never been in communication with each other prior to that evening. Apparently, the street in question is quite a reasonably long one.

[20] The appellant could not dispute, nor did he dispute that the victim was attacked and raped but denied that it was him. He maintained that the victim mistakenly identified him.

The Witnesses

[21] The State led the evidence of three State Witnesses, after which it closed its case. The accused testified in his own defence and then closed his case without any witnesses.

[22] The first State Witness, was the complainant, Z C M. She testified that she had visited her boyfriend on Christmas day, 25 December 2018, and she and her boyfriend had an argument. It was late at night around 11-12 (midnight) when she left her boyfriend's place and was walking home alone, when she came across the appellant in the street. She claimed that the appellant proceeded to pull and drag her to a certain house where he penetrated her vagina with his penis without her consent. He further then pulled and dragged her to an open veld. He also took her bag containing her cell phone and keys. Having reached the open veld, the

appellant attacked the victim by grabbing her by the hair, hitting her head against the tar road. The complainant lost consciousness. As a result, she was unable to relate what happened next. She discovered later that the appellant had cut her neck with a bottle.

[23] On regaining consciousness, the complainant found herself now alone. The accused no longer being present. She was unable to open her eyes and her face was covered in blood. She heard the sound of a trolley being pulled or pushed and shouted for help. The person with then trolley came to her aid. He took her to the Engen Garage where an ambulance was called. The ambulance arrived and took her to the Pholosong Hospital where she received treatment and was stabilised. Further, the cuts she had suffered were also stitched.

[24] Pholosong Hospital referred her to the Far East Rand Hospital for medical care relating to the rape. There she was examined by a nurse by the name of Linda Tshongwe.

[25] A J88 Form was handed into the Record as an exhibit. It indicated that swabs were collected as exhibits and sealed in a forensic bag. Further, the incident was reported to the Police.

[26] The complainant was able to identify certain characteristics and markings on the appellant's face. This was partly as a result of a "high mast light" situated in the area where the incident initially played out.

[27] The second State Witness was Mr Mashudu Tsapedi, the Investigating Officer. He stated that the complainant told him that she does not know the perpetrator. The Officer testified that the appellant was arrested through an analysis of the DNA collected which matched that of the appellant on the police system. The appellant was then traced to an address which also appeared on the system. The complainant was taken in a motor vehicle and whilst she was waiting in the car, the appellant emerged walking. The victim (the complainant), immediately then pointed him out as he entered the gate as being the perpetrator.

[28] The third State Witness was Linda Tshongwe, who attended to the complainant. Tshongwe is a qualified and registered nurse employed by the Department of Health, with nine years' experience as a nurse. She found that the complainant's clothes were dirty, she had lacerations on her neck and also had already been stitched. Both her eyes were bandaged and still bleeding. Her forehead was swollen. On her gynaecological area the nurse found that her posterior fornix, a thin folded skin at the back of the vulva, a part situated within the vagina, was severely bruised at five and seven o clock areas.

[29] The appellant testified that he did have sexual intercourse with the complainant. However, he maintained that the intercourse had been consensual as the complainant had been his girlfriend and that they had been in a romantic relationship. When he was asked during cross-examination if a certain Mohamed saw him when he entered the yard with the complainant, he stated that he did not know if Mohamed saw him because they never spoke at the time. However, the trial magistrate found it strange as in the examination in chief, the appellant had already stated that when he had come

in with the complainant, much earlier than the time of the rape, to go to his room in order to have the sexual intercourse with the complainant, he had greeted Mohamed. Further, the appellant stated that he did not know where the complainant stayed although he lived in Pedie street as did the complainant, because the street is a very long street. The appellant maintained that he had taken the complainant to the Mall at about 21:00 hours to take a taxi after her visit to his place. The appellant disputed the victim's version and stated that they had voluntarily gone to his place of residence where they had engaged in consensual sexual intercourse. He testified that since the day in question, he had not spoken to the victim. He stated that he and the complainant parted on good terms on that night.

The Single Witness

[30] The complainant's evidence called for a cautionary approach as she was a single witness. Section 208 of the Criminal Procedure Act[13] provides that an accused may be convicted of an offence on the single evidence of a competent witness.

[31] In *S v Carolus* [14] it was stated that:

> *"The trial court should weigh the evidence of the single witness and consider its merits and demerits, having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the evidence".*

[32] In the matter of *S v Jackson,* Olivier JA stated:

[13] Act 51 of 1977
[14] *S v Carolus 2008 (2) SALR 207 (SCA) 15*

"I will give you 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". [15]

[33] In *S v Sauls and Others,* [16] Diemont JA explained how cautionary rules [17] should be applied in a trial court. There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of *Rumpff J in S v Webber* [18]). The Trial Judge will weigh the evidence, will consider its merits and demerits and having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects in contradictions in the testimony, he is satisfied that the truth has been told.

In the Sauls matter, a guideline was given*:*

"The cautionary rule may be a guide to a right decision but it does not mean that the appeal should succeed if any criticism, however slender, of the witnesses' evidence were well founded … It has been said more

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[15] *S v Jackson 1998 (1) SACR 470 SCA at 476 E*

[16] *S v Sauls and Others 1981 (4) SA 182 (A)*

[17] *Armstrong evidence in rape cases in four Southern African countries, published in "Journal of South African Law" vol. 33 No. 2 1989 p 183 at 193 g-h states: "The Cautionary Rule in rape cases is based on the principle that women are naturally prone to lie and to fantasise, particularly in sexual matters and that they are naturally vengeful and spiteful and therefore likely to point a finger at an innocent man just out of spite. There is absolutely no evidence that women are less truthful than men, or that they fantasise more or that they are naturally vengeful and spiteful. Such a suggestion is misogynistic, and should be dismissed out of hand. Therefore the cautionary rule is based on principle which is discriminatory towards women, and inappropriate to countries committed to equal rights for men and women, and the rule should be prohibited on this ground alone. The cautionary rule has been called a lingering insult to women".*

[18] *S v Webber 1971 (3) SA 754 (A) at 758*

than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[34] In the present appeal, we are confronted with the aspect of a lady's evidence, together with the fact that she is a single witness. The reality is that in virtually all rape cases the victim is a single witness, virtually always a lady. It is very unlikely that the rape would have taken place in open view of the public and hence, the lack of anyone else other than the single witness, namely the victim, is nearly always a given.

[35] The trial magistrate applied "caution" in respect to the evidence. He discerned from the evidence of the case what were the actual events that took place, what could be believed, and what can be inferred.

[36] The following aspects are relevant with respect to the evidence of a single witness, who is a female.

(a) Is the witness (the woman) a competent witness.

(b) Is there corroboration with respect to the woman's evidence.

(c) The court will check for any contradictions in the evidence in chief and the cross-examination of the woman.

(d) The manner in which the woman gives the evidence.

(e) Was the woman's evidence consistent? And in this respect, the original complaint of the woman to the police in the terms of her statement would be looked at. Is the version of the woman highly probable if the court a quo studied all the evidence in a holistic manner?

The trial court will then, based on the above factors, scrutinize the woman's evidence with care. It is essential that each case must be measured by its own merits.

[37] If the trial court is then satisfied that there is proof beyond a reasonable doubt that the accused is guilty, a verdict of guilty will follow.

[38] In the matter of *Rugnanan v S*, it was held that the requirement for conviction in the case of a single witness is that the evidence must be satisfactory in that the truth has been told.[19]

Identification

[39] The matter of identification was dealt with in the case of *S v Mthetwa:*[20]:

> *"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest and; the reliability of his observation must also be tested. This depends on various factors, such a lighting, visibility, and eyesight; the proximity of the witness, the opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; collaboration; and*

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[19] *Rugnanan v S (259/2018) [2020] ZASCA 166.*
The judge in this matter, quoting from S v Sauls and Others (1981) (3) 172 (A) at 180 E-G: "There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of a single witness (see remarks of Rumpff JA in S v Webber …"). The trial Judge will weigh his evidence, will consider its merits or demerits, and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in a testimony, he is satisfied that <u>the truth has been told</u>. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded". (Per Schreiner JA in R v Nhlapho (AD) 10 November 1952). Quoted in R v Bellingham 1955 (2) SA 566 (A) at 569. It has been said more than once that "the exercise of caution must not be allowed to displace the exercise of common sense".
[20] *S v Mthetwa (1973) (3) SA 766 (A) at 768.*

suggestibility; the accused face, voice, build, gait, and dress; the results of identification parades, if any; and, of course the evidence by or on behalf of the accused. The list is non-exhaustive. These factors or such of them as are applicable in a particular case, are not individually decisive but must be weighed once against the other, in the light of the totality of the evidence and the probabilities …".

See also *S v Ngcina 2007 1 SACR 19 (SCA)* where it was stated*: "The court must be placed in a position to test what the single witness has said, in order to determine the reliability of a witness observation, which is often under traumatic circumstances".* See further *S v Franzenburg.* [21]

[40] It can be seen that various of the factors as mentioned in the Mthetwa case can apply in this appeal before this court. By way of example:

(a) The opportunity for observation which the Complainant had.

(b) The fact that the situation changed from one place to another where the Complainant would have had extra opportunity to observe.

(c) The nature of the evidence of the witnesses.

[41] In the matter of *R v Shekelele and Another* [22] where Dowling J stated with respect to identification:

"A bald statement that the accused is the person who committed the crime is not enough".

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[21] *S v Franzenburg 2004 1 SACR (E) 188.*
[22] *R v Shekelele and Another 1953 (1) SA 636 (T) at 638*

In the appeal before this court, the DNA plays an important part in the collaboration of the witness's testimony. Remembering the whole time that the witness is the complainant.

[42] The following are standouts from evidence in the trial court:

42.1 If the complainant was discovered at 23 hours, it is not consistent with leaving the appellant's house before 21:00 and being left at the Mall to catch a taxi home.

42.2 Why would the complainant take a taxi from the appellant's home if she lived 10 to 15 minutes' walk down the same road.

42.3 The appellant did not contact her after that date. Of course, he did not, as he believed her to be dead. In other words, the injuries he caused on her, in particular cutting her throat, would have, and could have resulted in her death.

42.4 If they were lovers, the probability is that he would have contacted her or she would have contacted him after recovering from her ordeal. If it was not the appellant who committed the act she would have reported her ordeal to him.

42.5 Complainant regains consciousness being at the same place where she had fallen unconscious. There is therefore no chance that she had walked into an assailant after the initial attack by the appellant.

42.6 If she was with her boyfriend, then there is no chance that she had a tryst with appellant at the same time – which is the same time according to the appellant's version, she did have consensual sexual intercourse with the appellant.

42.7 Why was the wife of the appellant not called to collaborate the appellant's presence between 21.00 on the 25th of December up to and including the early hours of the 26th of December 2019.

42.8 Certain of the Complainant's belongings were found in the veld where she stated she was taken by the appellant. Yet the appellant claimed he had taken her to the Mall to take a taxi.

[43] Other relevant aspects were:

(a) The complainant could identify the perpetrator (now the appellant).

(b) The appellant admitted to the sexual intercourse with the complainant.

(c) The light from the "high light" in the area allowed the complainant to see who was attacking her.

(d) The DNA of the complainant.

(e) The contentions surrounding what the complainant claimed was confirmed by two State witnesses.

(f) The failure by the appellant to call any witnesses, whilst by the nature of his testimony he would have been able to, and such would have proved to be most valuable to his contentions. This is particularly so with respect to the complaint's wife and Mohamed who purportedly saw him arrive with the complainant at his house. One can only but state that an adverse inference must be drawn from this.

(g) The victim's ability to even point out certain marks on the perpetrators body.

[44] As such, one can only state that the words of the magistrate below, in deciding the matter in the court a quo must be heeded:

> *"In applying caution the court could not find any inconsistency in Complainant's version, nor the motive to falsely accuse the accused person. To falsely implicate the accused, the testimony of other State witnesses proved the consistency of the complainant. She was satisfactory in all material respects. Her version is probable and it is corroborated even by the medical report. She was consistent even during cross-examination. She passed cross-examination if I used the word. She never contradicted herself. She was honest enough to state what she knows and what she does not know. …How the accused was also hitting her forehead against the tar road surface. There is no other intention except to kill the complainant so that she may never testify against the accused. On the other hand, the version of the accused is improbable. He contradicted himself. The secret affair does not exist. The court has accepted the version of the complainant…".*

[45] From the facts enunciated in the judgment of the magistrate in the court a quo, the appellant was the perpetrator of the crimes against the victim. The evidence before the court indicates that no mistaken identity took place. If the complainant wished to falsely implicate the appellant she would have done so immediately on the day that she was questioned by the police and directed them to his house instead of the police tracing him to the address after the DNA results had been obtained.

[46] The appellant's appeal in respect of his conviction can therefore only succeed if the trial court findings were vitiated by material misdirection or if it is shown from the record to be clearly wrong (*R v Dhlumayo and Another)* [23]. This was not the case in this appeal before this court. My view is that the magistrate did not err in convicting the appellant on all three charges. There is therefore no reason to interfere with the conviction imposed by the trial magistrate.

[47] I believe that the court a quo correctly accepted the version of the State and rejected that of the appellant.

Sentencing

[48] The appellant, maintains that the trial court erred in over emphasizing the seriousness of the offence. In that regard, the appellant maintained that a lengthy period of imprisonment as ordered by the court a quo was shockingly hard and induces a sense of shock. There is what is known as a basic triad when fundamental policy with respect to sentencing is considered.

In *Zinn v S* [24] Rumpff J stated that in the assessment of an appropriate sentence, the following has to be considered – namely that it is a "Triad consisting of the crime, the offender, and the interests of society."

[49] Section 51 (1) of the Minimum Sentences Act provides:

[23] *R v Dhlumayo and Another 1948 (2) SA 677 (A) at 698*
[24] *Zinn v S 1969 (2) SA 537 (A) at 540 G.*

"Not withstanding any law, but subject to sub-section (3) and (6), a Regional Court or a High Court shall sentence a person it has convicted of an offence referred to in part 1 of schedule 2 to imprisonment for life".

[50] Part 1 of schedule 2 to Act 105 of 1997 lists, *inter alia*, rape accompanied by the infliction of grievous bodily harm as one of the offences that attract a mandatory sentence of life imprisonment.

[51] In terms of Section 51 (2) (a) of the Act 105 of 1997, robbery with aggravating circumstances attracts a minimum sentence of 15 years imprisonment for a first offender.

[52] In terms of Section 51 (3) of Act 105 of 1997 a lesser sentence may be imposed, provided that substantial and compelling circumstances exist which justify the imposition of such lesser sentence. The court in those circumstances must note such compelling and substantial circumstances on the record of the proceedings and impose such lesser sentence as it deems fit.

[53] With this in mind, the main purposes of punishment has been described by the Appellate Division as:

(a) Firstly - deterrent

(b) Secondly - preventative

(c) Thirdly - reformative

(d) Fourthly - retributive

(See *S v Swanepoel* [25] *and S v Rabie* [26]).

[54] At the same time the words of Holmes JA in *S v Sparks* [27] should not be forgotten:

> *"Punishment should fit the criminal as well as the crime, be fair to the State and to the accused and blemished with a measure of mercy".*

[55] In the case of *S v Malgas* [28] Marais JA stated:

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentences as if it were the trial court and then substitute the sentence arrived at by it simply, because it prefers it. To do so would be to usurp the sentencing discretion of the trial court".*

[56] The Supreme Court of Appeal went on to say[29] that there are only two instances where a court of appeal may interfere, namely:

> *"Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh."*
>
> And where:

" "…even in the absence of material misdirection … the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had

[25] *S v Swanepoel 1945 AD 444 at 455*
[26] *S v Rabie 1975 (4) SA 855 A at 862 A-B*
[27] *S v Sparks 1972 (3) SA 396 (A) at 410 H*
[28] *S v Malgas 2001 (1) SACR 469 SCA at 478 D-E*
[29] Ibid at 478E-H

it been the trial court is so marked that it can properly be descried as "shocking", "startling" or disturbingly inappropriate".

[57] In the case of *R v Maphumulo & Others* [30], the court stated:

> *"The infliction of punishment is pre-eminently a matter of discretion for the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an Appellate Tribunal. That we should be slow to interfere with its discretion".*

[58] The so-called personal circumstances of the appellant, which are spelt out by the appellant could be looked at with a large question mark. They are all the more reason why the applicant's personal circumstances make his brutal conduct all the more reprehensible. They are that he: is married; has five minor children; spent most of his time looking after his children; lives with his wife and children; is the primary caregiver; and has strong family ties and bond with his children.

[59] Taking all this into account, such can only lead to one conclusion that the appellant, acted in a malicious thuggery mood on the evening in question. Everything pointing to an aggravated assault on the victim, with no real mitigating circumstances at all. A further aggravating factor is the appellant's two previous criminal convictions.

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[30] *R v Maphumulo & Others 1920 AD 56 at 57; See also S v Rabie 1974 (4) SA 885 (A) 57d-e*

[60] That an appeal court is loath to interfere with the sentence of a trial court has been established as far back as 1920 in *Maphumulo above*[31].

[61] Holmes JA, in the case of *S v De Jager,* [32] made the following remark regarding the discretion of the court of appeal to interfere with the sentence imposed by a lower court:

> *"It would not appear to be sufficiently recognised that a court of appeal does not have a general discrepancy to ameliorate the sentences of trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not juridically exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court would have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which a court of appeal would have imposed. It should therefore be recognised that appellant jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited".*

[62] See also *S v Matyityi,* [33] where the court increased the sentence which was originally imposed by the trial court from 25 years to life imprisonment based on the factor that the respondents' conduct themselves, as in this case, was a flagrant disregard for the sanctity of human life or individual physical integrity. The Matyityi

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[31] *R v Maphumulo and Others, 1920 AD 56, at 57.*
[32] *S v de Jager 1965 (2) SA 616 (AD) at 628-629.*
[33] *S v Matyityi (2011) SACR (1) 40 (SCA) para 13*.

judgment shows that where people acted in a manner that was unacceptable in any society, particularly one that is committed to the protection of life[34], human dignity[35], freedom and security of the person[36] and the rights of all persons including women, no mercy should be accepted.

[63] Having carefully considered the factors enunciated by the court a quo regarding sentence, I am unable to find that the judgment is "vitiated by an irregularity or misdirection". Hence the question which arises is whether the sentence is disturbingly inappropriate. There is no great disparity between the sentence imposed by the trial court and that this court would impose. A further aggravating factor is that the appellant had two prior criminal convictions.

[64] The nature of the offence and the violence committed against a woman, cannot be tolerated. There were no substantial or compelling circumstances for the appellant to have received a lesser sentence. There is no reason to deviate from the sentence as imposed by the magistrate in the trial court.

The Severity of the Actions of the Appellant

65.1 The Rape

The dicta in the case of *S v C*,[37] the court stated:

> *"Rape is regarded by Society as one of the most heinous of crimes, and rightly so. The rapist does not murder his victim. He murders her self-*

[34] Section 11 of the Constitution of the Republic of South Africa.
[35] Ibid, section 10.
[36] Ibid, section 12.
[37] *S v C 1996 2 SACR 181 (C)* at 186.

respect and destroys her feeling physically and mentally and security. His monstrous deed often haunts his victim and subjects her to a mental torment to the rest of her life, a fate often worse than loss of life".

65.2 Attempted Murder

The circumstances surrounding the assault, the knocking of the victim's head on the tarmac, the attempt to slit her throat and the general conduct of the appellant with respect to her, including dragging her on the ground, must be regarded as the most brutal assault that one could imagine that a male can inflict on a female. This brutality is in addition to the fact that the victim was raped. The facts points in one direction and that is that the perpetrator had the intent to murder the victim. In that way, evidence against him would be removed.

65.3 Robbery

In this instance, the appellant acted in a manner totally unacceptable in any society. He robbed the victim of her handbag and anything it might contain whilst in the process of being viciously violent to her. This all taking place in a society committed to the protection of the rights of all persons. The robbery was of her handbag. This basically amounts to the stealing of her identity. A handbag invariably contains a person's personal documents which includes I.D., bank cards, drivers licence, and more.

[66] The applicant maintains that the "sentencing court erred in the sentence as it is shockingly harsh and induces a sense of shock". I believe that the actions of the appellant, carried out in a cruel and cowardly manner, is what induces a sense of extreme shock, and anything less than the sentence that the magistrate imposed,

would have let the victim and society down. The Minimum Sentences Act reflects the interests of society where no exceptional and substantial circumstances are present. Its dictates must be followed.

[67] Based on the above, I order that the:

1. The appeal against conviction is dismissed.
2. The appeal against the sentence is dismissed.
3. The conviction and sentence imposed by the trial court are upheld.

BARIT A J

Acting Judge of the High Court
of South Africa

Gauteng Division, Pretoria

I agree

MALINDI J

Judge of the High Court
of South Africa

Gauteng Division, Pretoria

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