HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No: A62/2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**
_____ **29 November 2023**
Signature Date

In the appeal between:

MTHIMUNYE, SIPHO **APPELLANT**

and

THE **STATE**

RESPONDENT

Coram: NHARMURAVATE AJ et MILLAR J

Heard: 8 November 2023

Summary: A criminal law and procedure - rape of male inmate - appellant arrested for contravening section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007- convicted and sentenced under section 51(1) and (2) of Act 105 of 1997 - sentenced to life imprisonment - conviction and sentence confirmed – appeal dismissed.

Delivered: 29 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 November 2023.

JUDGMENT

NHARMURAVATE AJ (MILLAR J CONCURRING)

[1] The Appellant is Sipho Mthimunye, a 35-year-old male who was charged with two counts of contravening section 3 of the Criminal Law Amendment Act, (Sexual Offences) Act[1]. The first count was that on the 25 August 2020, he raped the complainant. The second count was that on the 26 August 2020 the Appellant committed another rape of the complainant. The Appellant pleaded not guilty to both counts in the court *a quo.*

[2] The trial proceeded and at its conclusion, the Appellant was thereafter convicted and sentenced by the Benoni Regional Court to life imprisonment on both counts of the indictment. The Appellant is now exercising his right to an automatic appeal in terms of section 309 of the Criminal Procedure Act.[2]

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[1] 32 of 2007.

[2] Section 309(1)(a) provides that if that person was sentenced to life imprisonment by the Regional Court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309-B.

[3] The first issue to be determined is whether the conviction of the Appellant was competent based on the evidence of a single witness. Secondly, whether the court *a quo* misdirected itself by imposing the sentence it did.

[4] The State led evidence of the complainant, his mother Ms Rosser and the nursing sister Ms. Skosana to discharge their onus.

[5] The complainant testified that he and the Appellant were both incarcerated at the Modder B detention center in August 2020. They shared a 60-sleeper cell but at the time it only had 26 inmates. The Appellant was, at the time in charge of the cell. Amongst his other duties, he had to ensure that the cell was clean.

[6] On the 25 August 2020, the Appellant woke the complainant from his bed, offered him a cigarette and led him to the bathroom for a smoke. They smoked in the bathroom and when the complainant had finished smoking, he turned to walk away. The Appellant grabbed him from behind choked him and thereafter he pulled his pants down, sexually violated him without his consent and without using a condom.

[7] As a resulted of being choked the complainant could not scream for help. Once he had finished violating the complainant, the Appellant ordered him to take a shower. Thereafter they went back to the cell. Before the complainant went to sleep, the Appellant threatened him and said that his “boys” would kill him if he reported the incident and that he was now his “boy”. The complainant could not sleep that night.

[8] The next morning the complainant was scared to report the rape incident to any of the officials. This was because the Appellant was the leader of the Rough Three gang and most of the inmates inside their cell were members of his gang. Furthermore, he had seen the gang’s engagement with the officials in the prison and he did not trust them.

[9] He trusted the head of the Centre, Mr. Mabunda, who he could not get a hold of after the incident. On the morning of 26 August 2020, he was also busy preparing a statement against the members of the Rough Three gang as they were threatening his mother. They had told her they would kill him if she did not pay a protection fee.

[10] The complainant's mother had been making the payments that they demanded to them but these eventually increased to a point where she could no longer afford to do so. His cousin, an ex-correctional services official, encouraged his mother to report the threats which she did. This was why he made a statement that day.

[11] The second incident occurred on the evening of Tuesday, 26 August 2020 when the lights in the cell were switched off. The Appellant called the complainant to come to him. The complainant complied because he feared him. The Appellant offered him a cigarette. When he leaned towards him to light the cigarette, the Appellant pushed his face down onto the pillow and pulled his pants down and proceeded to sexually violate him. Thereafter he again threatened the complaint with violence if he reported the incident.

[12] The following morning, the complainant was crying. He told a fellow inmate - Mr. Johannes Petrus Follie, what the Appellant had done to him the night before. Mr. Follie encouraged him to report the incident and it was as a result that when he called his mother that morning that he ended up reporting the two incidents of rape to her. It was his mother who assisted by reporting to the social worker Ms Thandi who in turn then reported to the head of Centre Mr. Mabunda.

[13] The complainant was thereafter sent to a clinic where he was examined and a J88 medical report[3] form was completed by the nursing sister who examined him. She confirmed that the injury may have been caused by a

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blunt instrument or in consequence of him being raped. He was then sent to a single cell thereafter he was transferred to Devon correctional center.

[14] Ms. Rosser, the complainant's mother, confirmed being informed by the complainant about the two rape incidents. She also confirmed compiling a statement to the Correctional Centres officials as there were threats being made by the Rough Three Gang against the complainant's life.

[15] The Appellant testified that he did not hear about the incident and that he knew nothing about it. He further testified that the injuries which were confirmed by the nursing sister were possibly caused by the fact that the complainant himself had inserted dagga into his anus in order to transport it to the other cells. The Appellant also accused the complainant of being a drug (needle) user and denied having anything to do with the rape or the HIV that the complainant claimed that he had contracted. However, the Appellant did admit that there was no bad blood between him and the complainant and offered no explanation for why the complainant would implicate him.

[16] The Appellant's counsel argued that the cautionary rule should have been applied. That there were no eye witnesses to the incident whereas the cell slept 24 inmates at the time. The complainant did not do anything to alert others, nor did he report the incident to the officials. Mr. Foley's statement, which was admitted into evidence, it was argued, contradicted the evidence given by the complainant.

[17] The complainant was a single witness and counsel appearing for the Appellant properly submitted that the Appellant may be convicted on the single evidence of any competent witness.[4] The complainant's evidence that he was raped twice, was first reported to Mr. Folley who although could not be found to give his testimony, however his statement was read in court which confirmed that the complainant informed him about the rape incident.

[4] In terms of section 208 of the Act an accused may be convicted of any offence on the evidence of any competent single witness. The court only needs to find the evidence trustworthy, and that the truth has been told, corroboration is not even necessary.

The complainant's evidence was also corroborated by both his mother and the nursing sister.

[18] It was not in issue that the Appellant was in fact the one who was in control of the cell and that it was he who would issue permission for inmates to smoke. He dictated what occurred in the cell. It is thus not improbable that he moved about the cell freely or that none of the other inmates would interfere with him.

[19] The credibility of the evidence of the complainant was further bolstered, in my view, when the complainant, under cross examination, was accused of using nyaope[5] and needles[6] whilst in prison. He was able to rebut this allegation successfully by both his willingness to show his body to the court *a quo* to prove that he did not take drugs intravenously and furthermore, the J88 corroborated this by recording the absence of any obvious physical injuries.

[20] The Appellant did not deny that the majority of inmates in the cell were members of his gang. It is thus improbable that the Appellant was unaware of what transpired in the cell.

[21] I am satisfied with the evidence given by the complainant as a single witness[7]. He was able to withstand lengthy cross examination by the Appellant's counsel and his evidence was credible; he was able to give a detailed account of how each incident occurred. The Appellant could not give any proper account of where he was or what he was doing when both incidents occurred. He offered no version and the court *a quo* rightfully found his explanation and plea to be no more than a bare denial.

[22] The court *a quo* considered that the complainant was a single witness and applied the cautionary rule.

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5 A street drug.

6 A reference designed to implicate the complainant in intravenous drug use and to lay a basis for his having contracted HIV, other than having been raped by the Appellant. In point of fact, there was no evidence which linked the complainant's HIV status with the rape and this did not play any role in the decision of the court *a quo* in respect of either conviction or sentence.

7 *S v Mahlangu* 2011 (2) SACR 164 (SCA) at 171 B.

[23] In *S v Sauls and Others* [8], it was held that :

> *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial court will weigh his 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 or contradictions in the testimony, he is satisfied that the truth has been told."*

[24] On consideration of the evidence led as a whole, the court *a quo,* correctly in my view, accepted the evidence of the complainant as corroborated by the witnesses who were called to testify. The evidence of the Appellant, being a bare denial, was correctly rejected. It is trite that the version of an accused person should be accepted, "even if it is reasonably possibly true." In the present instance, the learned Magistrate correctly found that the guilt of the Appellant had been established beyond a reasonable doubt and that the bare denial of the Appellant was to be rejected. For these reasons, I am of the view that there was no misdirection on the part of the court *a quo* in convicting the Appellant.

[25] In regard to sentencing, the Appellant argued that the court *a quo* over emphasized the seriousness of the crime without sufficient regard to his personal circumstances. He had no history of previous sexual offences and was, at least in this regard, a first-time offender.

[26] On behalf of the State, Counsel argued that the trial court did consider the factors normally taken into account for the purposes of sentence. Additionally, it was argued, that there were no substantial and compelling circumstances[9] placed before the court to justify any deviation from the minimum sentence which was imposed.

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8 1981 (3) SA 172 at 180E-F.

9 *S v Matyityi* 2011 (1) SACR 40 (SCA).

[27] A court of appeal may only interfere with a sentence imposed by a trial court in circumstances where it is clear that the trial court misdirected itself or imposed a sentence that was disturbingly inappropriate[10]. On consideration of the sentence that was imposed, this was neither in consequence of any misdirection on the part of the court *a quo* or disturbingly inappropriate. In the circumstances, the appeal against sentence fails.

[28] In the circumstances, I propose the following order:

[28.1] The appeal in respect of both the conviction and sentence is dismissed.

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N NHARMURAVATE

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

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A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 8 NOVEMBER 2023

DATE OF JUDGMENT: 29 NOVEMBER 2023

[10] *S v Kgosimore* 1999 (2) SACR 238 SCA.

APPEARANCES:

FOR THE APPELLANT

COUNSEL:	MS S SIMPSON
INSTRUCTED BY ATTORNEY:	LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT:

COUNSEL:	ADV P LUYT
INSTRUCTED BY:	THE DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA