



**HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: A60/2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

_____ **28 November 2023**

Signature

Date

In the appeal between:

ZWANE, WISEMAN SIPHIWE

APPELLANT

and

THE

STATE

RESPONDENT

Coram: NHARMURAVATE AJ *et* MILLAR J

Heard : 8 November 2023

Summary : a criminal law and procedure – rape- allegation of being in a relationship - 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) of Act 105 of 1997 - sentenced to life imprisonment- s 309(1)(a) appeal- conviction and sentence to life imprisonment confirmed by the appeal court.

Delivered: 28 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 14h00 on 28 November 2023.

JUDGMENT

NHARMURAVATE AJ (MILLAR J CONCURRING)

- [1] The Appellant is Sipiwe Wiseman Zwane a 37 year old male who was charged with three counts of contravention with the Criminal Procedure Act 105 of 77. Count 1 being that of kidnapping, the second and third counts of rape.¹
- [2] The Appellant was charged with kidnapping the complainant on 16 April 2021 at Daveyton taking her to Gumbi Cemetery and thereafter to his residence without her consent. In addition to that, the was charged with raping her at both the Cemetery and his residence.
- [3] The Appellant pleaded not guilty to both counts in the Court *a quo*.
- [4] The Appellant was convicted and sentenced by the Benoni Regional Court to life imprisonment on each count of rape and to 5 years imprisonment for the

¹ The Criminal Law Amendment Act (Sexual Offences Act) 32 of 2007.

kidnapping. Once the sentence of life had been imposed, the sentence for kidnapping runs concurrently.

- [5] The Appellant is aggrieved by both the conviction and sentence and has exercised his automatic right of appeal in terms of section 309(1)(a) of the Criminal Procedure Act.² which is an automatic right to an appeal where an accused has been sentenced to life imprisonment.
- [6] The State relied on the evidence of the complainant, her cousin and a nursing sister who examined her.
- [7] The complainant testified that around 18:30 on 16 April 2021, she took a ride in the Appellant's taxi. When she noticed that she was the only passenger left she then asked the driver drop her at Etwatwa Mall. The Appellant who was the taxi driver at the time, refused to do so. Thereafter, the Appellant sped off to Gumbi Cemetery. When they got there, he took out a knife and threatened to kill her. He demanded she take off her clothes. She did so and he then made her lie on top of a tombstone, where he raped her. The complainant testified that she was scared and for this reason did what he told her to do.
- [8] Once the Appellant was done, he ordered her to get dressed . Thereafter, they got back into his taxi and she was told to lie underneath the seat. They left the cemetery and drove to the Appellant's residence. At the Appellant's residence, she was further threatened and told not to draw any attention less she be stabbed.
- [9] She was then taken into his room where she was once again ordered to take off her clothes. The Appellant raped her again. He did not use a condom either at the Gumbi Cemetery or in his room. He tied her up and put her underwear inside her mouth to keep her quiet. She testified that he said she must not make any noise or try to escape.

² 51 of 1977. Once a life sentence is imposed in the Regional Court, there is an automatic right of appeal in terms of the Act.

- [10] The Appellant left for a few minutes and when he came back, she had managed to untie herself. He wanted to know why and she told him that she needed to go to the toilet. The Appellant then attempted to rape her again, for the third time, this time with a condom . She testified that she spoke to him and convinced him to desist and he did.
- [11] The Appellant thereafter fell asleep. Throughout the night, the complainant made attempts to escape which proved fruitless. In the morning, when the Appellant left to empty the toilet bucket, which was in the room, the complainant found his drivers licence and she memorised his details. The Appellant then accompanied her to the bus station after giving her, her belongings. He also gave her transport fare to go home. The Appellant was remorseful in the morning and pleaded that the complainant not report him.
- [12] The complainant arrived home very upset that morning and informed her cousin of her ordeal. It was her cousin who encouraged her to report the matter at the police station.
- [13] The evidence of the nursing sister confirmed that the complainant had had sexual intercourse and the evidence of her cousin, confirmed the evidence of the complainant about what had transpired when she had arrived home on the morning after. Her cousin also testified that she knew the complainant's boyfriend and that she had never seen the Appellant before.
- [14] The Appellant testified that the complainant was his girlfriend. They had been in a relationship for at least two months. He did not rape her. What occurred between them was consensual and this was not the first time that they had slept together.

- [15] He testified that on the day, it was the complainant who called him so that they could go together to his place. They went together to his place and had intercourse. While they were sleeping at night there were numerous calls on the complainant's phone which were from her steady boyfriend who sounded irate with the complainant. The complainant even informed him that he should deny knowing her, if her boyfriend called him. In the morning, the Appellant gave her R70.00 for transport home.
- [16] The Appellant testified that a number of his friends had seen them together and they knew that they are in a love relationship. However, none of his friends testified to corroborate his evidence in this regard.
- [17] The Appellant's counsel argued that cautionary rule should have been considered. It was argued that the State did not succeed in proving the guilt of the Appellant beyond a reasonable doubt on all three charges. The Appellant never kidnapped the complainant, it was a mutual arrangement. The complainant never made any attempt to flee or disembark the taxi or alert anyone in the vicinity of her predicament. The Appellant and the complainant were in a love relationship. It was not denied that they had had sexual intercourse but rather that it was consensual.
- [18] The complainant gave a full detailed account of how each incident occurred that is from her kidnapping to being sexually violated at both the Gumbi cemetery and the Appellant's residence. The complainant did not contradict herself and was not cross examined successfully by the defence.
- [19] What perhaps is disturbing is how the complainant was kidnapped by an Appellant who was a taxi driver. A taxi driver in this country is somebody that is in a position of power. That is somebody who is trusted by the young and old that if I get into this public transportation as a passenger, I will not be violated. I will pay my taxi fee in confidence that I will reach my destination in one peace. Nobody even thinks that if I take a taxi which is public transportation I may end up with such dire consequences.

- [20] Such conduct needs to be curbed because a large number of citizens in this country rely on public transportation which the largest percentage is composed of the taxi industry. Therefore a taxi driver has a duty of care towards the public at large and that is to ensure that they are safe and are protected whilst inside their taxi up until they reach their place of destination.
- [21] The Appellant abused his power by driving with the complainant against her will to the Gumbi Cemetery upon arrival threatening her with a weapon and forcing himself on her. The experience was clearly traumatic for the complainant, more so having taken place in respect of the first rape on a tombstone.
- [22] The Appellant's actions not only violated the complainant but also, albeit unbeknowning, the family of the deceased on whose tombstone the rape occurred.
- [23] Although the complainant was a single witness, it is trite law that a conviction can be made on the evidence of a single competent and credible witness, which the complainant was in this case.
- [24] On consideration of the evidence led, its evaluation and the findings of the Court *a quo*, I am unable to find that the learned Magistrate misdirected themselves in finding that the guilt of the accused on all three charges had been proved beyond a reasonable doubt³. It follows that the appeal against conviction must fail.
- [25] The Appellant's grounds of appeal in respect of his sentence were that the Court *a quo* over emphasized the seriousness of the crime without sufficient regard to his personal circumstances, in particular, that he had no previous convictions for any sexual offence. Furthermore, that the sentence imposed would not effectively aid in his rehabilitation and that he had already spent

³ *S v Tshabalala* 2003 (1) SACR 134 (SCA) 140A-B.

29 months awaiting trial. The Appellant relied on a number of cases in support of his contentions including *S v Mahomotsa*⁴.

[26] Additionally, it was argued that the sentence of five years for kidnapping and life imprisonment in terms of count 2 and 3 were strikingly shocking and inappropriate in the circumstances more particularly, the finding that there were no compelling and substantial circumstances. It was argued that the court over emphasized the interests of society to the detriment of the Appellant.

[27] It was argued for the State that there were no substantial and compelling circumstances⁵ which would permit the Court *a quo* to deviate from the imposition from the minimum sentence for rape. In particular, that the complainant had not suffered any mutilation or serious physical injury.⁶

[28] In line with the approach adopted by the Supreme Court of Appeal in *S v Malgas*,⁷ the Appellant has failed to demonstrate the existence of substantial and compelling circumstances in respect of the offences committed to warrant the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment.

[29] There are no grounds to interfere with the imposition of the sentences that were imposed by the Court *a quo*. It follows that in imposing those sentences, there was no misdirection on the part of the Court *a quo* and in the circumstances, the appeal against sentence must fail.

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

⁴ 2002 (2) SACR 435 (SCA).

⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA) at para [23].

⁶ See *Maila v the State* 429/2022 [2022] ZASCA (23 January 2023).

⁷ 2001 (2) SA 1222 (SCA).

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

N NHARMURAVATE

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree, and it is so ordered

A MILLAR

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

DATE OF HEARING: 8 NOVEMBER 2023

DATE OF JUDGMENT: 28 NOVEMBER 2023

APPEARANCES :

FOR THE APPELLANT

COUNSEL: ADV D MASILO

INSTRUCTED BY ATTORNEY: LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT

COUNSEL: ADV P LUYT

INSTRUCTED BY : THE DIRECTOR OF PUBLIC
PROSECUTIONS PRETORIA

