Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A298/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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MILTON VINCENT JIYANE **Appellant**

And

THE STATE **Respondent**

JUDGMENT

INTRODUCTION

1. By virtue of the sentence of life imprisonment being imposed by the Regional Court, the Appellant enjoys the right to appeal against the convictions and sentences. The Appellant was found guilty of 2 counts of contravening the provisions of section 3 read with section 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual offences and related matters) 32 of 2007 read with sections 256, 257 and 281 of the Criminal Procedure Act 51 of 1977; further read with section 51(1) part 1 and 5, and schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended. He was also found guilty of common assault.

2. The Appellant was sentenced to life imprisonment for each of the rape counts and was warned and discharged for the assault in terms of Section 39(2)(a)(i) of the Correctional Services Act 111 of 1998. All sentences are served concurrently with the sentence of life imprisonment.

FACTUAL BACKGROUND:

3. In essence the state's case rests on the evidence of two witnesses, B L and R N. On 31 December 2016, R N was in the company of her friend, B L, at Casanova Tarven in Tsakane. Having partied the whole night, in the morning

of 1 January 2017, they met the Appellant on their way to one Nthabiseng who was going to help them tell their parents that they were with her the whole night. It is common cause that they told the Appellant that they were hungry, and he offered them food at his house.

4. It is further common cause that they proceeded to the Appellant's house and ate food inside a Tupperware. It is also undisputed that he locked the burglar gate and closed the door. According to Miss L the Appellant took out an iron bar, a screwdriver and chain; and ordered them into the bedroom.

5. Miss L's version is that the Appellant hit her on the upper chest area, right by the arm and stabbed her with a screwdriver on her right upper arm[1]. In the bedroom, he ordered them to undress themselves.

6. Having undressed, he forcefully inserted his penis into her vagina and raped her. Thereafter, he raped R and came back to rape her. Initially, he was wearing a condom. However, when he raped her for the second time, he did not use a condom. As soon as he had gotten tired and fallen asleep, they searched for door keys to escape. Unfortunately, they did not find them. Upon pulling the sofa which was leaning against the door, they managed to open the door, but could not go out as the burglar gate was locked.

[1] Record page 10 para 20

7. At that stage R climbed onto the burglar gate and shouted for help. A gentleman by the name of Tshepo appeared and called another gentleman by the name of Vusi, who happened to be the brother of the Appellant. It is common cause that Vusi came to the aid of both R and B. As they walked out of the house, it is further common cause that they met Jacobeth Masola, whom they informed that the Appellant had raped them.

8. On their way to the police station, she, due to emotional trauma, decided to go home. R proceeded to the Police station to report the matter. On 2 January 2023, she reported the case. She was taken to Men's Clinic in Tsakane and related the entire ordeal to the medical doctor.

9. Under cross-examination, she confirmed that the Appellant sodomised and penetrated her using his tongue. She, further, stated that she bore the brunt of the suffering because the Appellant raped her repeatedly, taking breaks and coming back to rape her. As she was being molested, Refileo was standing by the side of the bed. She did the same when he was raping R. He assaulted and also slapped her on the face whenever she refused to be raped again.

10. The second state witness' version is that she was with B when they met the Appellant, at extension 15. Having walked with him into his house, he took out a Tupperware or a lunchbox which contained some meat and pap for them to eat. Upon finishing the food, they told the Appellant that they were leaving. He

locked the burglar gate and said to them no one was going anywhere.[2] She confirmed that the Appellant was carrying an iron rod in his hand, with which he assaulted them. Furthermore, she stated that the Appellant stabbed B with a screwdriver when she resisted his instructions. She testified that the Appellant took out his penis, inserted it into B's vagina and raped her. Thereafter, he came to her and did the same thing. He continued taking turns raping them until he got tired and fell asleep.

11. When they heard him snoring, they got dressed and searched for the door keys, which they didn't find. After opening the door and finding the burglar gate locked, she climbed thereon and called out for help. As already stated, Vusi came to their aid. On their way to the police station, B got cold feet and turned back home. Following her reporting the matter to the police, she went to the hospital for examination.

12. She mentioned that she did not sustain any visible injuries. Contrary to B's version, she testified that they were all lying on the bed during the ordeal. The appellant would simply shift the one and pull the other one because they were all on the bed, which was leaning against the wall.[3] A further contradiction emerged when she mentioned that the Appellant threatened them with a knife, which was like an okapi.[4]

[2] the transcript page 55 para 1
[3] the transcript page 62 para 2
[4] the transcript page 74 para 22

13. On 2 January 2017 at about 15H15, Doctor Samuel Sikitla Mosheledi testified that he examined Miss B P L. He stated that she had an inflammation on the right side of her face and at her back there were signs of inflammation, by that he meant redness. He testified that she could not move her mouth fully because it was swollen, warm and painful on touching. There was a stab wound on her left arm, which was consistent with being stabbed with a sharp object. These were fresh injuries, as shown by the redness of the wound[5]. Since she was due for menstruation, she would be more lubricated in the genital organs, he testified. Moreover, he further testified, on 28 December 2016, she had had consensual sex. This would lead to increased lubrication on her part. She had washed, urinated and changed her clothes. Upon examining her genital area, he did see any injuries. Even without any injuries, genital penetration by a blunt object such as a penis could not be excluded. The anal examination also did not reveal any injuries. However, he again did not exclude anal penetration by a blunt object.

14. Next to testify for the state was doctor Cynthia Lindiwe Ngudlwa. She testified that she conducted a gynaecological examination of R Nz, on 1 January 2017. She found her frenulum of the clitoris tender, the para-urethral folds swollen and tender, labia minora extremely tender and posterior fourchette with increased friability. These were not normal findings.[6]

[5] The transcript page 86 para 10
[6] Transcript page 98 para 20

15. The anal examination indicated that she was not sodomised. Under cross examination, she mentioned that the friability was an indication that penetration was attempted. When pressed on this point, she stated that R was penetrated because her vagina was dilated which indicated that something had gone inside the vagina to make it lax a bit.[7] Therefore, her conclusion was that she had been penetrated. When questioned by the court, she indicated that the increased friability and also the injury to the labia minora are evidence that she was fighting but penetration eventually occurred.

16. Vusi Masola's uncontested testimony is that, in the afternoon of the day in question, he was seated in his room when Jacobeth, his neighbor, called him. She indicated to him that a girl was screaming for help opposite her house. Having heard a bang of the burglar gate, Vusi jumped over the fence, with the neighbor's permission. He found the burglar gate locked and knocked on the window until Milton (the Appellant) opened. When the girls went out of the house, he noticed that they were not in a good mood[8] and he left the scene for his practice.

APPELLANT'S VERSION

17. The Appellant, Milton Vincent Jiyane, testified in his defence. Coming from buying cigarettes, the Appellant testified that, at or about past six in the morning, he met the two complainants at Jacobeth's gate, which is the house

[7] Transcript page 102 paragraphs 6 end 9
[8] Transcript page 117 para 3

opposite the one he was guarding. Following some small talk about where they were coming from that early, the complainants indicated that they were going to extension 10 and were hungry. He offered them food in his house. Since he had been drinking the whole night and only slept at 04h30 am, he was sleepy. When they entered the house, he gave them the food, locked the burglar gate, went to the bedroom and slept.

18. He locked the burglar gate because he feared that the ladies would steal. He was woken from his sleep by Vusi who was knocking on the window. On his way to opening the burglar gate, he found the complainants seated in the couch. Vusi told him that he had been informed that there are people screaming from the house, but he did not hear them. Having unlocked the door, he went to the gate where he met Jacobeth and other ladies.

JACOBETH'S VERSION

19. In his defence the Appellant called Jacobeth Monyatsi. Her version was that at around 13h00 her sister's child informed her that there were girls screaming at the house opposite hers. Due to the high wall, when she was standing on the veranda, she could not clearly see what was happening except for the people who were climbing on the burglar gate. These people told her that Milton (the Appellant) had kidnapped and raped them. She undertook to assist them. She telephoned one Malvin and requested him to inform the owner of the house that there were girls screaming in his house and stating that the Appellant had kidnapped them. Whilst waiting for Malvin's help, she saw Vusi and requested

him to assist. As already stated, Vusi scaled the fence and assisted the complainants.

ISSUES

20. This appeal pivots around two questions: Firstly, do the State witnesses' contradictions justify a conclusion that the state had failed to prove its case beyond reasonable doubt? Therefore, the court *a quo* misdirected itself in concluding that the State had proven its case beyond reasonable doubt. Secondly, did the complainants hatch a plan to implicate the Appellant to avoid being reprimanded for their night out at Casanova?

21. The trial court saw, heard and appraised the witnesses. Furthermore, it was mindful of the contradictions in the State's case. In paragraph 20 of page 197 of the judgment, the trial court referred to the inconsistences:

> *"In criticism the following can be noted against the evidence of the two complainants:*
>
> 1. *Ms N did not testify about an anal penetration of Ms L*
> 2. *Both Ms L and Ms N contradicted each other over a knife"*

22. Counsel for the Appellant referred to contradictions and improbabilities in the evidence of the complainants' statements on how the rape occurred. As already stated, the first complainant testified that R was standing when the

Appellant was busy molesting her. This is at odds with R's testimony that they were all lying on the bed. Furthermore, counsel for the Appellant submitted that severe injuries would have resulted from the assault using a screwdriver and an iron rod. It was also submitted on behalf of the Appellant, which submission we found mind boggling, that severe vaginal injuries would have resulted from the rape described by the witness.

THE LAW

23. Dealing with the issue of contradictions, the court in *State v Morgan*[9] said:

> *"It is convenient to deal first with the submissions relating to the contradictions. There is no doubt that the witnesses Leghlo, Baardman and Kiranie contradicted themselves in certain respects. Both the trial court and the court a quo were alive to this aspect in their assessment of the evidence. Bham AJ in dealing with the contradictions in their evidence said the following in a passage which I adopt:*
>
> *'Whilst it is important to consider, in determining whether the state has proved its case beyond reasonable doubt, the component parts of the evidence tendered on behalf of the state, one should be careful not to sink into the detail of such component parts in a manner which obviates the totality of the picture.'*

[9] 2008 JDR 1441 (SCA)

It is however clear that, despite the contradictions, their testimony on the crucial question of whether the appellant was at the scene and whether he shot at and killed the deceased was unshaken."[10]

24. In *Sithole v The State*[11] the court addressed this issue of witness contradictions and held:

"It is trite that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to way up and assess all contradictions, discrepancies, and other defects in the evidence and, in the end, to decide whether on the totality of the evidence the State has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the circumstances under which the observations were made and the different vantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witnesses."[12]

25. In the matter of *S v Van Der Meyden*[13] the court reminded us that:

"The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable

[10] Supra page 7 para 18
[11] (54/06) [2006] ZASCA 173 (28 September 2006)
[12] Supra para 7
[13] 1999 (1) SACR 447

doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other."[14]

26. The court *a quo* considered the evidence as a mosaic and made the following factual findings:

26.1The complainants trusted the accused when he offered them something to eat.

26.2 The accused pounced on the ignorance of youth and gullibility in making them believe he was a kindhearted person.

26.3 Based on the evidence, the court can safely find that the accused did in fact know what he was about to do to the complainants once they entered the house.

26.4The court found that the accused on the day in question sexually penetrated both complainants multiple times and without their consent.

26.5 The court also found that before and during the rapes he assaulted them and finally the accused evidence was found to be not only improbable but also

[14] Supra page 448 para F-G

false and rejected. The court a quo rejected that the complainants fabricated a story to escape the reprimand of their families.

27. It is trite that the Appeal court is reluctant to disturb factual findings of a trial court. The only time an Appeal court would interfere with such findings is if there is a clear misdirection or the trial court was clearly erroneous. Reiterating this principle, the court in *Minister of Safety and Security v Van Niekerk*[15] said:

> "*This court, as any Court of Appeal, would be slow to interfere with findings affected by a trial court based on a careful assessment of the credibility of witnesses and the probabilities of their respective versions.*[16]"

28. We cannot find any misdirection on the part of the court *a quo.* Even though there were contradictions between the two state witnesses, we are of the view that they do not go to the heart of the issue. They do not negate the penetration and by extension rape.

29. A helicopter view of the entirety evidence paints a tapestry which ties in with the version of the complainants. In brief, it is common cause that they were in the house with the Appellant from about 6h30 am to about 13h00 pm, they climbed the burglar gate and called for help, they told Jacobeth that the

[15] 2008(1)SACR 56
[16] Supra page59 para 10

Appellant had raped them, they went to report the case immediately and the follow day, the doctors confirmed forceful penetration on the same day on the second complainant, and confirmed bodily injuries consistent with the first complainant's version on the second day and finally, the Appellant was woken in the bedroom.

30. We find the Appellant's version at variance with the proven facts of the day in question. How could he not hear the screams of people inside the house with him and yet heard the knock on the window? For almost 7 hours he was oblivious to the presence of the witnesses. Vusi could hear the banging of the burglar gate outside and he could not. The submission that they. made up a story to implicate the Appellant is without merit. The witnesses' contradictions as highlighted by the Appellant are the nails in the coffin of this submission. We cannot fault the decision of the court a quo and the finding of guilt must remain undisturbed.

AD SENTENCE

31. The Appellant is of an offence which falls within the provisions of section 5(1) part 1 and 5, and schedule 2 of the Criminal Law Amendment Act 105 of 1997 which provides for life imprisonment. To deviate from the minimum sentence, the court must find substantial and compelling circumstances present which will justify the imposition of a lesser sentence than the one prescribed.

32. The issue of sentence falls exclusively within the discretion of the trial court. There is a plethora of cases to the effect. Dealing with this principle the court in the matter of *S v Rabie*[17] said:

> *"1. In any appeal against sentence, whether imposed by a Magistrate or a Judge, the court hearing the appeal-*
>
> *(a) Should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court'; and*
>
> *(b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."*[18]

33. Furthermore, in the matter of *S v Anderson*[19] the court stated the following:

> *"Over the years our courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentences induces a sense of shock or outrage, or that the sentence is*

[17] 1975 (4) SA 855 (AD)
[18] Supra page 857 para D-E
[19] 1964 (3) AD 494

grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice require it."[20]

34. The triad as mentioned in S v Zinn is still good law, 56 years later. The court said:

"What has to be considered is the triad consisting of the crime, the offender and the interest of society ."

APPELLANTS' PERSONAL CIRCUMSTANCES

35. In a pre-sentence report the following personal circumstances of the Appellant were placed before the trial court:

35.1 The first Appellant was a 38 year old with previous records:

35.2 On 13 July 2005 was found guilty of house breaking and sentenced to 3 years imprisonment

35.3 On 26 November 2014 he was found guilty of house breaking and sentenced to 24 months imprisonment half of which was suspended for a period of five years.

35.4 On 13 November 2019 he was found guilty of rape and sentenced to 10 years imprisonment.

35.5 He dropped out of school after completing grade 7. He is not married and does not have any children.

[20] 1964 (3) SA 494 (A) 495 D-E

35.6 He tried his hand running a tuck shop and a car wash businesses but failed. He was employed by his cousin in Mpumalanga building houses. He made a meagre salary.

35.7 He is on chronic medication since November 2021.

SERIOUSNESS OF THE OFFENCE

36. In the matter of *Tshabalala vs The State; Ntuli vs The State*[21] Mathopo AJ, as he then was, held the following:

> *"The facts of this case demonstrates that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidents of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women."*[22]

37. We could not agree more with the sentiments expressed by the court. These sentiments come a long way if regard is had to what was stated in *S v Chapman*[23] at paragraph 3-4 of the judgment.

[21] 2019 ZACC 48
[22] Supra page 49 para 1
[23] 1997 (3) SA 341 (SCA)

INTEREST OF THE COMMUNITY

38. It is in the interest of the community that women are protected and are able to realize their full potential. Women are the corner stone of our community especially if one takes into account that a number of families are women-headed households. In imposing the sentence, the court *a quo* took into account the interest of the community. We cannot find neither reason nor rhyme to interfere with the decision of the trial.

39. The In the result we make the following order:

ORDER

40. Appeal against both the convictions and sentences is dismissed.

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M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

I Concur

_____

W. J. OLIVIER

ACTING JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 15 August 2023

Date of judgement: 25 August 2023

APPEARANCES:

ADVOCATE FOR APPELLANTS: H. L. ALBERTS

INSTRUCTED BY: LEGAL-AID

ADVOCATE FOR RESPONDENTS: C. PRUIS

INSTRUCTED BY: NATIONAL PROSECTING AUTHORITY