IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case number: **AR45/2022**

In the matter between:

MUZI CYPRIAN MNGOMA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Mossop J and Nicholson AJ
Heard: 27 October 2023
Delivered: 3 November 2023

ORDER

On appeal from: Pinetown Regional Court (sitting as the court of first instance):

1. The appeal against convictions and sentences is dismissed.

JUDGMENT

Mossop J (Nicholson AJ concurring):

[1] The issues in this appeal are narrow. Two young girls, who did not know each other, were raped a year apart. Both claim that the appellant is their rapist. The issue is whether they are correct. If they are, the only other issue is whether the appellant received a just and appropriate sentence.

[2] The appellant faced two counts of rape in the Pinetown Regional Court, was convicted on each of those two counts and was sentenced to life imprisonment on each count, with the sentences imposed to run concurrently with each other. By virtue of the sentences imposed upon him, he enjoys an automatic right of appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977 (the Act).

[3] That the two complainants, both of whom were under the age of 16, were raped is not controversial and is not contested by the appellant. The first rape occurred on 4 January 2017 and the second one occurred on 16 January 2018. The complainant in count one was 11 years old and the complainant in count two was 14 years old when they were raped. Because of their ages, and the fact that the complainant in count one was raped twice, the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, as read with the provisions of Part I of Schedule 1 of that Act, were applicable. Neither of the complainants knew the appellant prior to their respective ordeals. Despite the fact that they were raped a year apart, the version each narrated on how they came to be raped contained remarkably similar facts, as shall shortly become apparent.

[4] At his trial, the appellant pleaded not guilty to both counts of rape and elected not to disclose the basis of his defence. During the trial, no version at all was put to any of the complainants on behalf of the appellant other than to deny the fact that he was their tormentor. The appellant, significantly, also elected not to testify in his defence and called no witnesses.

[5] It is so that where identification is an issue, as in this case, the evidence adduced should be considered cautiously. As Holmes JA said in *S v Mthetwa*:[1]

'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: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities…'

[6] Both rapes occurred during daylight hours and each complainant was in the company of the rapist for a substantial period of time within which each could make her observations of him. No identification parade was, however, held, and each complainant merely identified the appellant as her rapist by effecting a dock identification of him at the trial in the court a quo.

[7] Evidence of identification elicited in this fashion must be cautiously assessed. It has its own inherent dangers. There is a danger that a lay person on seeing an accused person in the dock:

'… feels reassured that he is correct in his identification, even though this may not have been the position were they not there'.

In addition to that,

'[t]o any member of the public ... the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect'.[2]

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[1] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

[2] *S v Maradu* 1994 (2) SACR 410 (W) at 413G-H, cited with approval in *S v Daba* 1996 (1) SACR 243 (E) at 248D-H.

[8] While evidence of a dock identification is admissible:

'… generally, unless it is shown to be sourced in an independent preceding identification, it carries little weight'.[3] (Footnotes omitted.)

I remain mindful of that. But there was other evidential material that was discovered which was relevant to the identity of the rapist of each of the complainants. This was evidence in the form of deoxyribonucleic acid (DNA): the rapist of the complainants ejaculated into each of them, and that ejaculate was later collected from each of them and was subjected to scientific analysis by the State.

[9] While evidence of DNA profiling may be of great significance in a matter, the Supreme Court of Appeal has also cautioned that it must in each case be viewed in its proper perspective.[4] As Van der Merwe AJA noted in *SB*, DNA evidence is circumstantial evidence, and the weight that attaches thereto is dependent on:

'(i) The establishment of the chain evidence, i.e. that the respective samples were properly taken and safeguarded until they were tested in the laboratory.

(ii) The proper functioning of the machines and equipment used to produce the electropherograms.

(iii) The acceptability of the interpretation of the electropherograms.

(iv) The probability of such a match or inclusion in the particular circumstances.

(v) The other evidence in the case.'[5]

[10] None of the first four factors mentioned by Van der Merwe AJA were in dispute at the trial. They, however, appeared to be in dispute in this appeal because counsel for the appellant submitted in his heads of argument that:

'… the DNA evidence was not properly admitted and as such [sic] inadmissible.'

That, however, is the sum of the submission on that issue. The heads of argument do not elaborate further on the proposition. Counsel for the appellant, Mr Nyandu, was invited to add muscle and flesh to this skeleton of a submission. He commenced by indicating that he had not drawn the heads of argument. He almost immediately thereafter finished by stating that having considered that specific submission, he was not inclined to persist with it as he could find no basis for it in the transcript of

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[3] *S v Tandwa and others* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) para 129.

[4] *S v SB* [2013] ZASCA 115; 2014 (1) SACR 66 (SCA) para 17.

[5] Ibid para 18.

proceedings. I think that was a proper concession to make for the reasons that now follow.

[11] At no stage did the defence deny, either before or during the trial, any aspect of the evidence relating to the DNA sample harvested from each of the complainants. The record reveals this to be the case. Prior to the trial commencing, a pre-trial conference was convened. The proceedings at that pre-trial conference were digitally recorded and transcribed and formed part of the record submitted on appeal to this court. At that conference, the court a quo asked the legal representative for the appellant what the basis of the defence offered by the appellant would be. The response received to this question was the following:

'MR PILLAY Your Worship, the accused accepts the evidence, Your Worship, however he says he has no knowledge of the incident. He doesn't want to dispute the chain however he is exercising his right to remain silent and put the State to the proof thereof.

COURT I didn't hear you about the chain evidence … [intervention]

MR PILLAY We are not disputing the DNA or the chain … [intervention]

COURT You're not disputing the DNA?

MR PILLAY The chain, Your Worship.

COURT As well as the finding of the forensic official?

MR PILLAY Correct Your Worship, I've discussed it with the client and I've advised him of his rights, Your Worship. The client intends to plead not guilty and has no admissions at this stage that is what he had informed the Court, there are no 220 admissions at this stage however that may change.

COURT All right. So the trial will be a short one?

MR PILLAY Yes, Your Worship.'

[12] This demonstrates the approach that the defence intended to take at the trial insofar as the DNA evidence was concerned. In my view, that approach was not deviated from at the trial. I appreciate that no formal admissions were made by the defence at any time but what was stated at a pre-trial conference carries some weight and cannot simply be ignored. In *Director of Public Prosecutions, KwaZulu-Natal v Pillay,*[6] Goosen JA said the following:

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[6] *Director of Public Prosecutions, KwaZulu-Natal v Pillay* [2023] ZASCA 105; 2023 (2) SACR 254 (SCA) para 39.

‘The High Court concluded that the respondent's right was not explained to him. Before this court, counsel for the respondent contended that whatever had occurred at the pre-trial remand proceedings was irrelevant, since it was the trial magistrate who was obliged to explain and act in accordance with the section. The argument is without substance. The purpose of the pre-trial conference is to ensure that the enrolled case is ready to proceed to trial. Such pre-trial proceedings are not to be ignored.’

[13] Consistent with the approach that the defence intended to adopt as explained at the pre-trial conference is the following exchange that subsequently occurred at the trial. The State gave notice to the court and the defence that it intended to hand up documentation that dealt with the DNA evidence. The following interaction then occurred:

‘PROSECUTOR Thank you Your Worship. The State intends leading evidence of DNA in respect of count 1 and in respect of count 2. The State is in receipt of the chain statement from count 1 however before I proceed leading such chain statement on record may the defence confirm whether this is handed in by consent?

COURT Mr Pillay?

MR PILLAY Thank you, Your Worship. I am canvassing with my client and with the defence and my instructions are not to dispute.

COURT Accused do you confirm what your attorney has stated?

ACCUSED No objection Your Worship.’

[14] While the exchanges referred to above make it plain that the DNA evidence was admitted by the defence, it is still nonetheless necessary for this court to determine whether that admission was correctly made. It cannot be in the interests of justice to permit a conviction to stand based upon the admission of facts that did not establish the proposition admitted. A civilised and sophisticated legal system such as ours would not tolerate a conviction to stand on false evidence.

[15] Before considering the DNA evidence, it is necessary to mention that count one had a South African Police Services (SAPS) CAS number of 65/01/2017 and count two had a SAPS CAS number of 392/01/2018. These CAS numbers are frequently referred to in the documentation which will presently be considered. It is also necessary to note that the appellant’s full names are Muzi Cyprian Mngoma.

[16] With regard to count one, the prosecutor presented six documents in the State's possession that established the chain of evidence regarding the specimen collected from the complainant in that count. These documents comprised of:

(a) A medical report from Dr K Singh (Dr Singh), who examined the complainant after she been raped and who extracted the specimen of semen from her. He recorded the seal number that he applied to the extracted specimen as being 14D7AC0738 and also recorded that the CAS number was 65/01/2017 and stated that he had handed it over to a Detective Warrant Officer Ntuli, who is the investigating officer on that count;

(b) An affidavit from the chief clerk of SAPS Pinetown, one Clemmy Reddy, who confirmed that he had received a sexual evidence kit from Detective Warrant Officer Ntuli that bore SAPS CAS number 65/01/2017 that had not been tampered with and which bore seal number PA4002433616 and who handed it to one Sergeant B G Ndlovu;

(c) An affidavit from Sergeant B G Ndlovu who received a sexual evidence kit in a matter with SAPS CAS number 65/01/2017 bearing seal number PA4002433616 and who conveyed it to the Forensic Science Laboratory (FSL) in Amanzimtoti;

(d) An affidavit from the investigating officer in the matter, the previously mentioned Detective Warrant Officer Ntuli, which bore a reference to SAPS CAS number 65/01/2017, explaining how he came to arrest the appellant;

(e) An affidavit deposed to in terms of the provisions of section 212 of the Act by Ms Haajira Kaldine (Ms Kaldine), who is a forensic analyst attached to the Forensic Database Management Section of the Forensic Services, who verified the outcome of a comparative search on the Forensic DNA Database and who compiled a Forensic DNA Investigative Lead Report. She confirmed that the forensic DNA profile derived from SAPS CAS number 648/08/2018[7] was the same as the forensic DNA profile in matters with Pinetown SAPS CAS numbers 65/01/2017[8] and 392/01/2018[9]; and

(f) An affidavit deposed to by Ms Jeannie Van Dyk (Ms Van Dyk), a forensic analyst and reporting officer at the FSL who received the case files and DNA results

[7] A SAPS CAS number unrelated to the two counts in this matter but which is mentioned in the appellant's SAP 69 form, later admitted by him.
[8] The first count.
[9] The second count.

of matters bearing the Pinetown SAPS CAS numbers 65/01/2017, 392/01/2018 and 648/08/2018 and who stated that:

'From the results in Table 1, I can make the following findings:

4.1 The DNA result from the following exhibits matches the DNA result from the reference sample "MUZI MNGOMA" (17DBDD5019) (PA4003499081) **[PINETOWN CAS 65/01/2017]**, reference sample "MC MNGOMA" (16DBBX5553) (PA4002032434) **[PINETOWN CAS 648/08/2018]** and reference sample "MNGOMA MC" (17DBAC3873) (PA4003529045) **[PINETOWN CAS 648/08/2018]**:

4.1.1 "CERVICAL" swab "A. M[….]" (14D7AC0738) (PA4002433616) **[PINETOWN CAS 65/01/2017]** and;

4.1.2 "VAGINA" swab "Z[….] T" (15D1AA0273) (PA4002611132) **[PINETOWN CAS 392/01/2018]**.

4.2 The most conservative occurrence for the DNA result from the exhibits mentioned in paragraph 4.1.1 and paragraph 4.1.2 is 1 in 1.3 million trillion people.'

[17] The seal number applied by Dr Singh to the specimen he drew from the complainant in count one is reflected in sub-paragraph 4.1.1 of Ms Van Dyk's report.

[18] Each one of these six documents, save for the first, was, correctly, read into the record so that there could be no confusion as to what each related to and what the significance of each document in the total picture being presented by the State was. The first document was not read into the record because Dr Singh gave oral evidence at the trial.

[19] A similar exercise was performed with regard to count two. The prosecutor identified four further documents in the State's possession, namely:

(a) A medical report from Doctor T Mayise (Dr Mayise), who examined the complainant in this count and who extracted the specimen from her. He recorded the CAS number as being 392/01/2018, to which was applied two seals, namely 15D1AA0273 and PA4002611132 and stated that he had handed the sealed specimen over to a Warrant Officer Xulu;

(b) An affidavit from Sergeant Mathonsi Monica Nobuhle who received a rape collection kit in matter bearing SAPS CAS number 392/01/2018 from Warrant Officer Xulu, bearing serial number 15D1AA0273 and handed it to Constable S M Majola;

(c) An affidavit from Constable S M Majola who took receipt of a rape kit bearing seal number PA4002611132 from Sergeant Nobuhle and conveyed it to the FSL in Pretoria; and
(d) An affidavit from the investigating officer, Detective Warrant Officer Ntuli, explaining how he came to arrest the appellant.

[20] The State also relied on the affidavit of Ms Kaldine and Ms Van Dyk on count two. The analysis that each performed included the samples in both the first and second count and was, obviously, only conducted once. The seal numbers applied by Dr Mayise to the specimen that he extracted are reflected in paragraph 4.1.2 of Ms Van Dyk's report.

[21] The documents relating to count 2 were also read into the record, save for the medical report prepared by Dr Mayise, because he, like Dr Singh, gave oral evidence at the trial.

[22] The chain of evidence on both counts remained intact and unbroken.

[23] The documents relating to the DNA evidence on both counts were handed in and received by the court, as exhibits. Before this occurred, however, the court interacted with the appellant's legal representative as follows:

'COURT Mr Pillay?
MR PILLAY No objection Your Worship
COURT You confirm that?
MR PILLAY I confirm that Your Worship.'

[24] After handing in these documents, the State closed its case. Notwithstanding the potentially damaging evidence contained in the DNA evidence, which palpably called for an explanation, the appellant elected not to go into the witness box and also closed his case.

[25] I mentioned earlier in this judgment that both complainants told versions that included remarkably similar facts. The complainant on count one stated that she was near some shops in Pinetown on the day that she was raped, when a stranger

approached her and asked her to accompany him to a shop where he was going to purchase a school uniform for a child who allegedly had the same body build as herself. She did so but was taken away from the shops by the man and was ultimately raped twice by him. The complainant on count two said that she was in Pinetown to purchase school uniforms and asked a man for directions to a particular store that apparently sold them. The man that she asked accompanied her to the store where she made a purchase. He then asked her to accompany him to his parental home because he claimed to have a school uniform there that resembled the uniform that the complainant had purchased, which he promised to give her. He also promised to purchase her further school uniforms. She accompanied him away from the shops and was also raped.

[26] After considering the weight to be attached to a dock identification and after scrutinising the DNA evidence presented by the State, I am satisfied that the identity of the person who raped the two young girls was established beyond reasonable doubt. That person was the appellant and the regional magistrate accordingly correctly convicted him on the two counts of rape. There was simply no explanation, other than that offered by the State, for the presence of the appellant's semen in each complainant. The appeal against conviction must thus fail.

[27] On the issue of sentence, it is trite that sentence is a matter that is the prerogative of the trial court.[10] In *S v Malgas,*[11] the court held that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence 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. 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. …However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as shocking, startling or disturbingly inappropriate.'

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[10] *S v Hewitt* 2017 (1) SACR 309 (SCA).
[11] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

[28] This approach was reaffirmed in *Hewitt*,[12] where Maya DP stated that:

'An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[29] After his conviction, the accused admitted his previous convictions. They make for shocking reading. They appear to include several convictions for rape which chronologically happened after the two rapes in this matter but in respect of which he was convicted and sentenced before his convictions in this matter. From his SAP 69s received by the court after his conviction, it is apparent that one of those rape convictions was under SAPS CAS number 648/9/2018, referred to in the FSL documents prepared by Ms Kaldine and Ms Van Dyk. The sentences imposed on him for these counts of rape was life imprisonment.

[30] In the appellant's heads of argument, it is submitted that the court did not attach sufficient weight to the fact that the accused is an unmarried man who is 46 years old and is the father of seven children. It was also submitted that he was a first offender insofar as minimum sentence legislation is concerned. That latter submission need not be considered with any degree of seriousness and is clearly merely a makeweight. The minimum sentence legislation of life imprisonment applies equally to first offenders provided the offence meets the threshold defined by the legislature. The offences for which the appellant has been convicted are so serious that his personal circumstances must necessarily constitute a secondary consideration in the search for an appropriate sentence for his conduct.

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[12] *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8; *S v Rabie* 1975 (4) SA 855 (A) 860H-861A.

[31] The appellant is clearly a predator who preys on women, including young girls. His list of convictions demonstrates that he shows no respect for women or their right to bodily integrity. Our new society prides itself on its hard won freedoms. When those freedoms are violated by people like the appellant, it is grotesque. The appellant is the type of person who cannot be permitted to enjoy the freedoms that he denies to others. He cannot be allowed to live amongst us, for if he does, no woman will be safe from him. Life is all about making choices. The appellant has made his choices and in doing so, he has demonstrated that he will not obey the laws that bind all right-thinking members of society. He must now suffer the consequences.

[32] I am unable to discern any misdirection committed by the regional magistrate on the issue of sentence, nor do I find the sentences imposed upon the appellant to be repugnant. On the contrary, the sentences received by the appellant were just and appropriate and entirely deserved. The appeal against sentence must consequently also fail.

[33] I would accordingly propose the following order:

1. The appeal against convictions and sentences is dismissed.

MOSSOP J

I agree

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NICHOLSON AJ

APPEARANCES

Counsel for the appellant	:	Mr S Nyandu
Instructed by:	:	Legal Aid South Africa Durban
Counsel for the respondent	:	Mr M Gula
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of argument	:	27 October 2023
Date of Judgment	:	3 November 2023