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

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR71/2021

In the matter between:

In the matter between:

SABELO MTAMBO **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

The appeal against convictions and sentences on both counts is dismissed.

JUDGMENT

Sipunzi AJ

[1] On 23 October 2019, the appellant was convicted in the Regional Court, sitting at Vryheid, on charges of kidnapping and rape. He was sentenced to three years' imprisonment on the charge of kidnapping and life imprisonment on the charge of rape. With the leave of the trial court on count 1, he appeals against his conviction and sentence. In relation to count 2, the appellant appeals in terms of the automatic right of appeal against the conviction and sentence.

[2] According to the complainant, during the evening of 2 June 2016, she had been sent to the shop by her grandmother. On her way home, she encountered the appellant, who was unknown to her. He held her by her arm and led her to his house in a nearby locality. He warned her not to cry or raise alarm, as he would kill her. As they were walking towards his home, they went past people, but she was too afraid to alert them to her situation. When some people asked where he was taking her, the appellant told them that she was his child. When they arrived at his house, he sexually penetrated her. She started to cry but the appellant told her to stop crying, and threatened to kill her.

[3] During the night, the appellant led her to a forest where he sexually penetrated her for the second time. When he finished, he took her to a mud house at Msimango homestead and sexually penetrated her on two further occasions. In the morning, the appellant left her alone in the house. She remained in that house until she was fetched by the local councillor Bonginkosi Maxwell Nxusa ("Mr Nxusa).

[4] From the said house, the complainant was taken to the police station and later examined by Doctor Nkosinathi Mkhwanazi ("Dr Mkhwanazi"). Dr Mkhwanazi recorded his examination of the complainant in the J88 form, marked exhibit C. With regard to the gynaecological examination, he recorded that the complainant was at tanner stage 1 of her development. She looked scared, presented with a tear on the right labia minora, a torn hymen and had a discharge on her vagina. Dr Mkhwanazi further explained that he did not insert his finger in the complainant's vagina, as he observed from the complainant's mental state that she looked scared. He did not want to cause any further trauma by putting his fingers in her vagina. He concluded that there was '*evidence of genital trauma*'. He opined that his findings were consistent with the history that was provided.

[5] According to the complainant's aunt, N[…] N[…] ("Miss N[…]"), she alerted their neighbours and the police that the complainant could not be traced, since she was sent to the shop by her grandmother. The search for the complainant continued until she was found alone inside Msimango homestead on the following morning. She also testified that she was present when Dr Mkhwanazi examined the complainant. When it was put to her that during the bail application, she had said that Dr Mkhwanazi had inserted his finger into the complainant's vagina, she denied it:

> *'Ms Philakhe- …Okay, you told the Court previously that the doctor, when examining T…, he put on his gloves and he inserted his finger in to T…'s vagina, do you recall that? … Ms N*[…]- *Well, the doctor took that object and then he used it to inspect it, and then he said we must come and observe. He pointed, not that he inserted. Court- He pointed his finger? --- He*

was pointing to that object, the one that we were watching. Well, at the time, as he was taking that machine, on his finger on that glove, there was blood. And then he showed us…'

And further:

'Ms N[…]*a- … in actual fact, he did not insert his finger, he was just picking up, or lifting up that object.'* (My emphasis.)

[6] Mr Nxusa confirmed the version of Miss N[…] on how the complainant was found. He added that during the search, he acquired the appellant's cell phone number, and it was the appellant who directed him to the house where the complainant was found.

[7] The appellant did not deny that he met the complainant during the evening of 2 June 2016, and that he spent that night with the complainant. He contended that he had consumed alcohol and was intoxicated when he met the complainant. He admired her for her good manners that she displayed. For this, he had bought her snacks at the shop. The complainant then followed him to his home. He allowed her to remain in his company, gave her food and they were together at his home until he fell asleep. He denied the allegations that he had kidnapped and raped the complainant. He also denied that he had threatened to kill her if she cried out.

[8] The main issue arising on appeal, is whether the learned magistrate misdirected herself in finding that the evidence of the state established the guilt of the appellant beyond reasonable doubt on the following grounds, namely:

a. Whether the evidence of the complainant, upon which the State mainly relied, was unreliable when measured against the totality of the evidence on record and was properly considered;
b. Whether the bodily and gynaecological injuries, or lack thereof, were inconsistent with the alleged prolonged forced sexual activity;
c. Whether the absence of fresh tears to the hymen, as recorded in the J88 form, had any significance;
d. Whether the absence of semen after the alleged four instances of rape, as apparent in the DNA report, and the presence of vaginal discharge within 24 hours of the alleged rape merited further questioning of Dr Mkhwanazi by the court;
e. Whether the trial court erred and misdirected itself in its judgment when it evaluated the evidence and made favourable findings on the credibility of complaint; the medical evidence of Dr Mkhwanazi and/or his opinion; and
f. Whether it erred when it found that the appellant's alleged state of intoxication was inherently improbable and when it found that his version was false and not reasonably possibly true.

[9] It is not in dispute that the appellant and the complainant met during the evening of 2 June 2016, after which they spent the night in each other's company. It is common cause that the complainant was seven years old at the time, and she had been sent to the shop by her grandmother. It is also not in dispute that the complainant was found in a house alone after Mr Nxusa had been directed by the appellant on where to find her.

[10] The State mainly relied on the evidence of a single witness on how she alleged the appellant forced her to his home and how he had raped her repeatedly. The fundamental principle on the evaluation of the evidence of a single witness is that it must be approached with caution. In *S v Sauls and others*[1], the court held:-

[1] 1981 (3) SA 172 (A) at 180E- G.

> ‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness…. The trial Judge 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. 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.’

[11] The evaluation of the evidence of all the witnesses by the court revealed a clear and substantial application of these principles and included due regard being had to the age of the complainant. On a closer look at the trial court’s evaluation of the evidence of the complainant, it clearly and satisfactorily applied due caution to the complainant’s credibility and reliability, in light of her age and when tested against the evidence of other witnesses.

[12] The argument raised on behalf of the appellant was mainly based on the lack of genital injuries that were inconsistent with the alleged prolonged forced sexual activity. Much was also made of the apparent absence of semen and blood from the complainant’s genitals during the examination by Dr Mkhwanazi. It was further argued that the trial court failed to accord sufficient weight to the improbabilities of the evidence of the complainant. There was specific reference to the allegation that the appellant dragged the complainant by her arm in full view of other people and that even after having been placed on a rocky surface, she presented with no injuries.

[13] The argument about the lack of or minimal genital injuries appears to be oblivious to the elements of rape as provided for in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and in particular 'sexual penetration' as defined in section 1. Sexual penetration is defined as including

> 'any act which causes penetration *to any extent whatsoever* by-
>
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person. . .'

From the above extract, there is no requirement to show the extent to which a complainant's genital organ was penetrated by the alleged rapist.

[14] In *H v S*[2], the complainant was 12 years old at the time of the incident.[3] The trial court had found that full penetration had not occurred. The appeal court held that for a rape conviction to stand, a full penetration was not required, even in instances where sexual abuse had been long-standing, and that it sufficed that it had occurred. It was held: -

> 'Our common law held that the slightest penetration was sufficient to complete the act of sexual intercourse. Burchell (3rd edition) puts it as follows at 706; "it is thus irrelevant that the male does not emit semen, nor does it matter that the woman's hymen is not ruptured". See cases such as *S v K* 1972 (2) SA 898 (A) at 900C where rape occurred even though the woman's hymen was not ruptured.'

[15] The record is silent on whether the extent of the penetration was canvassed with the complainant. There had been no indication that the appellant may have

[2] [2014] ZAGPJHC 214.
[3] Ibid para 6.

lacked the ability to have an erection or perform sexual acts on anyone, other than a blanket denial of any sexual penetration of the complainant. Therefore, the argument that the inconsistent, or lack of, injuries on the complainant's genital organs or absence of the semen during the examination should raise doubt about the veracity of her version, cannot be sustained. The reference that was made to the appellant's state of sobriety and how it would have influenced the nature of the complainant's injuries was respectfully unconvincing.

[16] With regard to the argument that the trial court did not afford sufficient weight to the improbabilities in the complainant's version, there are various factual statements that required consideration. Much was made about whether the doctor inserted his finger into the vagina of the complainant. This appeared to be fuelled by the allegation that Miss N[…] testified that Dr Mkhwanazi had inserted his finger when she testified during bail application. Miss N[…] repeatedly denied that. At page 124 of the record, she stated categorically that '*he did not insert his finger*, *he was just picking up, or lifting up that object.'* This explanation by Miss N[…] is corroborated by Dr Mkhwanazi's evidence that he did not insert his finger. It is furthermore consistent with Dr Mkhwanazi's explanation on why he decided not to insert his finger. When Dr Mkhwanazi was questioned about the nature of the injuries and the method of examination, he explained that he decided not to insert his fingers in her vagina because she appeared to be scared, and he also did not want to subject her to secondary trauma.

[17] Further, during cross-examination, the complainant also explained that when the appellant was questioned why she was in his company and holding her hand, he

responded to say that she was his child. This explanation was not challenged. The complainant also explained that she did not offer any resistance or raise alarm because the appellant had warned her against such and threatened to kill her if she did. There was also an argument that the absence of bruises or injuries on the complainant's arm where she was held by the appellant should be regarded as another inconsistency. This contention failed to take into account that according to the complainant, the appellant held her arm. It also would not be expected of her to present with any injuries if regard is had to her explanation that the appellant was telling people that she was his child and that she was not offering any resistance. Thus, the criticism that the trial court failed to give due regard to these improbabilities is not supported by the record of proceedings.

[18] In earnest and fairness to the nature of the evidence and the probabilities in allegations of sexual misconduct, the presence of vaginal discharge and the absence of semen and/or blood during the examination of the complainant, should have no bearing on the veracity of her allegations of rape by the appellant. The argument that same should be regarded as inconsistencies and improbabilities, were not supported by the objective facts which minimized any chances that the complainant may have fabricated her version of events since she met up with the appellant.

[19] If regard is had to the caution expressed in *R v Manda,*[4] there is evidence that shows consistency in the complainant's version. Dr Mkhwanazi examined her within 24 hours after the alleged incident. For instance, he found that the complainant presented with genital injuries that had 'evidence of genital trauma'. According to Miss N[…], when the complainant was brought to her by Mr Nxusa, she would not

[4] 1951 (3) SA 158 (A) at 163E.

respond when asked if she was well; she appeared nervous; and in her encounter with Dr Mkhwanazi, she appeared to be scared. This is all consistent with the experience she alleged she had in the company of the appellant. Her version of events also has many similarities to that of the appellant, albeit his denial that he forcefully took her to his home and repeatedly sexually penetrated her. The appellant contended that he was intoxicated and almost implying that he should not be held accountable for most of his actions on the night in question.

[20] A careful evaluation of the evidence of the appellant; and that of the complainant, which finds consistency in the versions of Dr Mkhwanazi, Miss N[…] and Mr Nxusa, I am satisfied that the appellant was correctly convicted on both counts. In my view, there was no misdirection committed by the trial court on both convictions. The appeal against convictions should therefore fail.

[21] Following his conviction of kidnapping on count 1 and rape on count 2 (which rape fell within the provisions of s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, (the Act)), the appellant was sentenced to undergo 3 years' imprisonment on count 1 and life imprisonment on count 2.

[22] There was no criticism or argument against the sentence imposed in count 1, hence focus shall be on the remainder of the sentence. The appellant's challenge to the sentence imposed on count 2 was that:

(a) The court *a quo* failed to clear the misconception of whether the court was required to consider exceptional or substantial circumstances.

(b) The appellant further argued that had the court paid attention to such confusion and addressed the circumstances as contemplated in the Act, the appellant might have escaped the sentence of life imprisonment.

[23] The question to be answered is whether the trial court erred and materially misdirected itself in failing to find substantial and compelling circumstances that would have warranted a departure from the life sentence it imposed. Furthermore, whether the court exhibited any confusion on what circumstances it was required to consider in its determination on sentence.

[24] Where sentencing involves offences that are listed in the Act, the court must adopt an approach that is conscious of the purpose and the spirit that informed the enactment of the Act. Section 51(1) reads as follows:

'Notwithstanding any other law, but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.'

[25] With regard to rape, Part I of Schedule 2 reads as follows:

'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) . . .

(b) where the victim-

(i) is a person under the age of 16 years…'

[26] A court of appeal may interfere in the sentence imposed by the trial court if it is found that there was a misdirection in the exercise of judicial discretion.[5]

[27] In *S v PB,*[6] and with regard to the approach that should be adopted where the provisions of the Act are applicable, Bosielo JA expressed himself in the following terms:-

> 'What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.'

[28] The main guiding principle in the exercise of judicial discretion on the sentencing of an offender, is outlined in *S v Zinn.*[7] The court is required to impose an appropriate sentence, which must reflect a consideration of the personal circumstances of the offender; the nature of the offence committed; and the public interest.

[29] The following personal circumstances of the appellant were placed on record through his legal representative:

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[5] 1975 (4) SA 855 (A) at 857E; *S v Pieters* 1987 (3) SA 717 (A) at 737F–H.
[6] [2012] ZASCA 154; 2013 (2) SACR 533 (SCA) para 20.
[7] 1969 (2) SA 537 (A).

(a) He was 27 years old at the time of sentencing but 23 years old when the offences were committed;

(b) He had no previous convictions;

(c) He was a father, and his son was four years old;

(d) He was unmarried and was in a stable relationship with the mother of his child;

(e) He was employed by DSTV MultiChoice as a technician; and

(f) He had been in police custody from 5 June 2016 until 17 March 2017, when he was released on bail.

[30] In *S v Matyityi,*[8] the court provided the following approach to be adopted when dealing with these types of cases:-

> 'To paraphrase from *Malgas*: the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer "business as usual". A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.' (Footnote omitted.)

[31] From the onset, the trial court noted that the applicable provision was section 51(1) of the Act. Throughout the judgment, it appeared to be fully conscious of the established applicable principles. This is evident in its engagement with the trite principles set out in *Malgas*[9] *and Matyityi*[10]. These also appear in detail in the consideration of the personal circumstances of the appellant and when it made a value judgment in all the factors that were set out in the triad principle in *Zinn*[11]. The

[8] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).
[9] 2001 (1) SACR 469 (SCA).
[10] Ibid.
[11] Ibid.

argument that the court failed to clear the confusion about whether the court had to consider substantial or compelling circumstances cannot stand.

[32] A profound characterization of rape and its negative impact on a person's quality of life has been set out in *S v Chapman*,[12] where it is said:-

> 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[33] This passage brings about the question of the proportionality of sentences in rape cases, which has also been a subject of debate amongst the courts. In *S v Mahomotsa*[13] the court held that *'[i]f substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable'*. This implied that the proportion of the sentence must still be informed by those factors that are unique to such case, when judicial discretion is exercised.

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[12] 1997 (3) SA 341 (SCA) at 344J-345B.
[13] 2002 (2) SACR 435 (SCA) para 18.

[34] The age of the appellant, both at the time of the incident (23 years) and at sentence (27 years), are neutral factors. To that extent in *S v Matyityi*[14] the court held:-

> 'Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor.'

The appellant, who is a father, displayed no elements of immaturity or reduced moral blameworthiness if regard is had to the manner in which he conducted himself during the commission of the offences involved. Instead, it can be gathered that he carefully and skilfully went about all the details of how the offence was committed and as such cannot be classified as youthful offender.

[35] In summary, there were no factors to suggest that the prescribed sentence of life imprisonment may have been disproportionate when the unique circumstances of the appellant's case were applied to the trite guiding principles in sentencing. The record shows a substantial engagement with all the principles and a diligent application to the facts that informed the ultimate finding that the appropriate sentence on court 2 was life imprisonment.

[36] With all the above considerations, the trial court indeed correctly found that no substantial and compelling circumstances existed. Therefore, there was no apparent

[14] Supra (n13) at para 14.

misdirection by the trial court and nothing warrants an interference. The sentence of life imprisonment was justified.

[37] I therefore, propose an order in the following terms:

The appeal against convictions and sentences on both counts is dismissed.

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SIPUNZI AJ

I agree, and it is so ordered.

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NCUBE J

Date of hearing: 6 October 2023

Date Judgment delivered: 3 November 2023

APPEARANCES

For the appellant:

Mr GJ Leppan

For the respondent:

Mr R Du Preez

Director of Public Prosecutions

Pietermaritzburg