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

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number: A116/2023

In the matter between:

TUMELO BOOI MANKO Appellant

and

THE STATE Respondent

CORAM: MUSI, JP *et* REINDERS, J

JUDGMENT BY: REINDERS, J

HEARD ON: 26 FEBRUARY 2024

DELIVERED ON: 15 MARCH 2024

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[1] The appellant was arraigned in the Regional Court in Bloemfontein on charges of assault with the intent to do grievous bodily harm [Count 1] and rape (contravention of s 3 of the General Law (Sexual Offences and Related

Matters) Amendment Act)[1], read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act [2] [Count 2].

[2] Appellant pleaded not guilty and tendered no plea explanation. Having heard the evidence of the state witnesses and the appellant, the trial court on 9 November 2022 convicted the appellant on Count 1 on the competent verdict of assault, and on Count 2 of rape as charged. The trial court took both convictions together for purposes of sentence and sentenced the appellant to imprisonment for ten years. This appeal comes before us with leave granted by the court *a quo* in respect of both the convictions and sentence.

[3] It is undisputed that sexual intercourse (intercourse) occurred between the appellant and complainant on Sunday 31 January 2021 (Sunday evening) at the back of a residence in the rural town of Petrusburg. According to the appellant, the intercourse was consensual. It is common cause that both the complainant and the appellant were present at the said residence where a few of them enjoyed alcoholic drinks (traditional beer – beer) that evening. The appellant and complainant resided in the same street and were very well-known to each other, the complainant having grown up before the appellant and describing him as a bigger brother to her. A report on a medico-legal examination (the J88), performed on the complainant by a medical official (a registered nurse - the nurse) on Monday 1 February 2021 (Monday), was handed in by the State as evidence with no objection thereto by the defence. The content thereof and subsequent findings shall be dealt with herein below.

[4] The magistrate in her judgment summarised and alluded to the evidence tendered by both the State and the defence. The State called the complainant two other witnesses, to wit Mr TI Ramohlabi (referred to by the witnesses as Thuso) and the complainant's father, Mr B[…] M[…]. The appellant testified and did not call any witnesses.

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[1] 32 of 2007.
[2] 105 of 1997.

[5] The nub of the state's version of events, as accepted by the learned magistrate, entailed the following:

5.1 During the course of Sunday evening (at around 21h30) the complainant was seated next to the appellant when he hit her between the eyes with a plastic jar (jug) filled with beer. Hereafter, she decided to return home to her residence just on the opposite side of the street. As she exited the door, the appellant followed her and constrained her from behind with his arm, punching her in the stomach and covering her mouth with his hand. He dragged (pulled) her to a nearby tree in the yard where it was dark, where after he pushed her to the ground, put his knee on her chest and undressed her. He proceeded having intercourse with her by penetrating her vagina with his penis, turned her around on her stomach and penetrated her vagina from behind. Although trying to fight off the appellant, she was unable to do so as the appellant was "very strong, fast and quick". She was not only threatened by the appellant that he would kill her if she screamed for help, but also should she tell anybody about what had happened, and she had to act "normally" when the two of them entered the house again. Later complainant's father arrived and he accompanied her home. She made a report of the incident to her sister-in-law and father, and called the police informing them of the incident. Complainant was advised by the police to lay a charge against the appellant the following day. She did not change her clothing of the Sunday evening nor did she wash herself and was taken by ambulance to attend to the medical examination.

5.2 The evidence of Thuso and complainant's father related only to what had transpired before the intercourse and thereafter, as they were not witnesses to the intercourse itself. The upshot thereof as alluded to by the magistrate in her judgment, is that Thuso confirmed the appellant throwing beer (an amount of about two glasses) at the complainant, and the complainant's father testifying that the complainant made a report to him, that she had a swelling between her eyes and was full of dust on her clothing the following day.

[6] Appellant denied that he had thrown any beer at the complainant or hit her with a jug – he merely and accidentally spilled a few drops of beer on her. According to the appellant not only was the intercourse consensual, but the complainant was the party initiating the act, which he attempted to resist since the start as he was unwilling to sexually engage with her. After some time however, he succumbed to her advances and they had intercourse, amongst others, on the bonnet of a vehicle and on the ground. During cross-examination appellant testified that not only was he in a secretive relationship with the complainant, but he had been engaging in sexual intercourse with the her for 'a very long time'. In fact, they had intercourse on a Friday prior to the Sunday evening. According to appellant there was a lawn on the place where the intercourse took place. When confronted therewith that the aforementioned averments were not put to the complainant during cross-examination for her to respond thereto, he indicated that he did not give such instructions to his legal representative and eventually laid the blame at the feet of his attorney.

[7] Ms Kruger, on behalf of the appellant, summarised the appellant's grounds of appeal against his convictions and sentence as follows:

> "1.5.1 That the Court a quo erred in finding that the evidence of the Complainant was corroborated by the evidence of the second and third state witnesses.
>
> 1.5.2 That the Court a quo erred in finding that the injuries in the J88 corresponds with the viva voce evidence.
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> 1.5.3 That the Court a quo erred in finding that the State proved its case beyond reasonable doubt.
>
> 1.5.4 That the Court a quo erred in rejecting the version of the Appellant as reasonable possible true.
>
> 1.5.5 That the Court a quo erred in finding no substantial and compelling circumstances."

[8] It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by the credibility findings of that court, unless it is convinced that such findings are clearly incorrect.[3]

[9] In my view a perusal of the record reveals that the State's case was by no means faultless. It was, however, not hopeless. From the magistrate's judgment it is evident that she comprehensively dealt with and considered discrepancies between the evidence of the state witnesses. She found same not to be material. The magistrate was well aware of the fact that the complainant was a single witness in respect of the intercourse. She applied the cautionary rules in her evaluation of the complainant's evidence and was satisfied, having considered all the evidence tendered before her inclusive of any shortcomings, that the complainant "did tell the truth". The magistrate rejected the version of appellant that the intercourse was consensual, as not being reasonably possibly true.

[10] In the J88, the nurse recorded what the complaint had conveyed to her during the medical examination as follows: "…the perpetrator hit her with a jug of bear(*sic)* on the forehead…, the victim stood up and walked home then the perpetrator followed her and pulled her towards a dark place …he undressed her and raped her…penetrated her countless times and turned her to another position and rapped(*sic)* her further…

In the last sentence the nurse indicated "…Victim has a small laceration on her forehead and slight swelling." On inspection of the complainant's genitalia, she noted "tears on the perineum" and marked it on the schematic drawing as "cracks". Under the heading "Conclusions" the following is recorded:

> "Possible sexual assault because the victim's body and genitalia was full of sand and also on the head and clothes. Statement given by the victim is in line with injuries sustained."

Much was made during the trial (and in the grounds of appeal) in respect of the complainant's insistence that she did not sustain a laceration on her

[3] See: ***S v Francis*** 1991 (1) SACR 198 (A) at 204c; ***J v S*** [1998] 2 All SA 267 (A) at 271c.

forehead, whilst the J88 indicated such. In my view nothing turns on this discrepancy. The nurse noticed both a swelling and a laceration.

[11] The magistrate in her judgment mentioned several aspects of the state witnesses' evidence which lent support to the complainant's version. I consider the following to be of vital importance:

> "The other evidence that might render complainant's version more likely that there was no consent is the fact that the complainant was full of sand and even in her private parts. That also confirms the version of the complainant. And the other aspect is the fact that the medical officer who examined the complainant also found some tears or scars in her genital area or cracks; let me put it that way. And that is an indication that there was no cooperation from the complainant during sexual intercourse. And it also confirms the version of the complainant when she said that when the accused turned her and had sexual intercourse with her from behind, she was resisting. That is an indication that there was no cooperation and that can likely cause the tears." [emphasis added]

[12] In my view the magistrate was correct with this conclusion. The strongest corroboration for the version of the complainant (as a single witness) that she did not give any consent to the intercourse and that the rape took place as she testified, is indeed to be found in the uncontested evidence of an independent and objective third party. As indicated, the J88 recorded the sand on the complainant's body and in her genitalia. The uncontroverted evidence in respect of the rape constituted an insurmountable hurdle for the appellant. On the recorded clinical facts indicating the presence of sand in the private parts of the complainant, the version proffered by the appellant that the intercourse took place at the insistence of the complainant on the bonnet of a car and on lawn cannot be reasonably possibly true, as correctly found by the magistrate. There is no reasonable (nor logical) explanation how sand would then have ended up in the private parts of the complainant. Ms Kruger responsibly did not attempt to convince us otherwise. On the contrary, she had to concede same to be critical evidence in favour of the State's case.

[13] I might mention in passing that the appellant's failure to put up his version of a secret romantic relationship between himself and the complainant which involved sexual intercourse prior to the rape "for a long time", also militates against the appellant's version that the intercourse was consensual. These allegations were in my view of importance to support his defence that the intercourse was consensual. Be that as it may, even absent any denial or admission of such evidence by the complainant, the complainant's version of how the intercourse had occurred, was corroborated by the nurse. In my view the swelling and laceration on the complainant's forehead likewise supported her version that she had been hit by appellant with a plastic jug as she had testified.

[14] There is no indication of any misdirection by the magistrate in respect of any relevant evidence. She took a holistic view of all the evidence tendered before her, applied the legal principles in considering the matter and the appellant's guilt, and comprehensively indicated her reasoning for finding the state to had proven its case beyond a reasonable doubt. Therefore, there is no basis upon which we should interfere with the conviction. The result is that the appeal against conviction should be dismissed.

[15] As mentioned, the appellant was charged with and convicted of a count of rape to be read with the provisions of Act 105 of 1997, Part III of Schedule 2. Regarding this count, it is evident that the trial court was well aware of the principles enunciated in ***S v Malgas***[4] in respect of substantial and compelling circumstances warranting a deviation from the minimum ordained sentence of imprisonment for ten years. She considered same and declined to find any substantial and compelling circumstances.

[16] The magistrate duly applied the triad principles in ***Zinn***[5], the purposes of sentence and the principles to be applied in arriving at a fair and just sentence

[4] 2001 (SACR) 469 (SCA).
[5] 1969 (2) SA 537 (A) at 540G.

16.1 The personal circumstances of the appellant were dealt with by the magistrate. She took into account that the appellant was 41 years of age; the father of two minor children who resided with his aunt; contributed to the financial needs of his minor children with the money that he earned and had spent 18 months in custody awaiting trial.

16.2 The record reveals that the appellant had been convicted of several crimes over a period of time, although none on a charge of rape, as correctly indicated by the magistrate. It would seem that she thus considered the applicant for purposes of sentence to be a first offender (referring throughout to the prescribed minimum sentence of imprisonment for a period of ten years). She however considered it as an aggravating factor that the appellant was arrested for the rape whilst on parole. Moreover, she alluded thereto that the accused "…has been exposed to different sentence options on previous convictions, however that did not deter him from committing further crimes."

16.3 The seriousness of the crime was stressed by the magistrate who added that rape is "very rife in our communities" and "the society are not pleased by levels of violent crimes against women and children in the country".

[17] It has long been established that sentencing is pre-eminently the prerogative of the trial court and a court of appeal should be careful not to erode this discretion.[6] Interference is warranted where there has been an irregularity that results in a failure of justice, or when the court a quo misdirected itself to such an extent that its decision on sentencing is vitiated, or the sentence is so disproportionate or shocking that no court could have imposed it.[7]

[18] Ms Kruger in her heads of argument invited our attention to the judgment by the Supreme Court of Appeal in ***S v PB***[8] where it was held that: "It follows

[6]See: ***S v Rabie*** 1975 (4) 855 (A) at 857 at E-F.
[7]See: ***Bogaards v S*** 2013 (1) SACR (CC)1 at [41].
[8]2013 (2) SACR 533 (SCA) at [20].

therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling."

[19] Mindful of the aforementioned principles, the submissions placed before us for interference with the sentence imposed by the trial court, were considered.

[20] The appellant filed a notice of appeal on 6 February 2023 against the imposed sentence, stating that the trial court had erred in finding that there are no compelling and substantial circumstances in relation to the rape on the following basis:

> "Whereas:
>
> The offence of rape in which applicant was convicted, is not extra ordinary crime of rape. Pain and suffering of complainant is similar to complaints of ordinary rape.
>
> Injuries in J88 is not gruesome injuries. It is normal in cases of rape.

Ms Kruger in her heads of argument eloquently rephrased these two grounds in submitting that it is her instruction that the trial court erred in not considering the following to be sufficient for a deviation in relation to the rape on the following basis:

> "4.4.1 No evidence was tendered to substantiate an argument that the complainant suffered lasting emotional trauma.
>
> 4.4.2 The complainant did not sustain serious physical injuries and it will be submitted that it is a relevant factor which the Court must take into account to arrive at an appropriate sentence, as it is indicative of the lesser objective gravity of the offence."

20.1 The submission in respect of the absence of evidence of "lasting emotional trauma" has no merit. The record reveals that, although no Victim Impact Report of the complainant was filed, complainant tendered viva voce evidence in aggravation of sentence on the ongoing trauma and the trauma that she had experienced. Despite the best

efforts of appellant's legal representative to unsettle the complainant during cross-examination, she was steadfast in her testimony on the emotional trauma she had suffered. She testified that the rape incident negatively affected her work as she feared retaliation by the appellant on herself or even on her children. Importantly, she testified that the trauma is "even worse" and "…the emotions and the – the psychic does not heal."

20.2 The stance taken by the appellant in respect of non-serious physical injuries sustained by the complainant ("not gruesome", "pain and suffering is similar to normal rapes"), does not avail the appellant to the extent that this singular factor should have caused a deviation from the minimum imposed sentence. In the event that serious physical injuries had been inflicted on the complainant, the appellant would have been charged with rape falling under Part I of Schedule 2 […(c) involving the infliction of grievous bodily harm…] which attracts a minimum sentence of imprisonment for life.

[21] In my view the seriousness of rape can never be overemphasized. Our courts have consistently condemned rape in the strongest expressions as an invasion of the dignity, privacy, integrity and personal freedom of the victim.[9]

21.1 The views expressed by the Supreme Court of Appeal in ***S v MM***[10] are apposite:

'It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'

[9] See: ***S v Chapman*** 1997 (2) SACR 3 (SCA) at 5B-E.
[10] 2013 (2) SACR 292 (SCA) at [17].

21.2 I fully align myself with the sentiments expressed by the magistrate that "…the accused showed disrespect to the complainant, starting from the house when he poured beer on her, up until the manner in which he committed this crime" (the rape).

[22] Having taken into account all of the aforementioned, the magistrate cannot be faulted and there are no grounds upon which we can interfere with the sentence imposed by the trial court. I am satisfied that, as found by the magistrate, there are no compelling and substantial circumstances which would warrant a deviation from the prescribed minimum sentence of imprisonment for ten years. The result is that the appeal against sentence thus stands to be dismissed.

[23] Accordingly the following order is made:

The appeal against the convictions and sentence is dismissed.

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C REINDERS, J

I concur.

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CJ MUSI, JP

On behalf of the Appellant:	Ms S Kruger
Instructed by:	Legal Aid South Africa BLOEMFONTEIN
On behalf of the Respondent:	Ms S Tunzi
Instructed by:	Director of Public Prosecutions BLOEMFONTEIN