REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A259/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

14/12/2023
DATE

SIGNATURE

In the matter between:

WILLIAM MULAUDZI Appellant

and

THE STATE Respondent

Delivered: This judgment was prepared and authorised by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. the date and for hand-down is deemed to be 14 December 2023.

JUDGMENT

MOGOTSI, AJ (with Leso AJ Concurring)

Introduction

[1] On 6 June 2017, the appellant, who was legally represented during the duration of the trial, was convicted by the Pretoria Regional Court on four counts of contravention of section 3 read with sections 1, 55, 56 (1), 56A, 57, 58, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and section 51 read with sections 92, 94, 256, 257 and 261 of the Criminal Procedure Act 51 of 1977 and section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (Rape) and Housebreaking with intent to steal and theft. On 13 July 2017, he was sentenced to four terms of life imprisonment and 12 years' imprisonment respectively.

[2] Aggrieved by the conviction and sentence, the appellant exercised his automatic right to appeal by virtue of sections 10 and 11 of the Judicial Matters Amendment Act 42 of 2013 read with sections 309(1) and 309B of the Criminal Procedure Act 51 of 1977.

[3] The record of the proceedings is incomplete. The letter penned by Adriaan Bekker, a Regional Co-ordinator; and Regional Magistrate Pretoria, shows there are no prospects that the same will be reconstructed. Both counsels for the respondent and the appellant applied that the appeal be heard based on the available record because the crucial evidence is available, and this court granted the application.[1]

Background

[4] The complainant, a 92-year-old woman, was living alone at [redacted] Street, Groenkloof for 40 years. On 18 October 2013, whilst she was in bed preparing to sleep, two assailants entered the house through the ceiling. The shorter of the two assailants had carnal intercourse with her whilst the tallest was gathering items that they removed from the house. The appellant was linked to the commission of the offences by both DNA and fingerprint evidence.

Evidence for the state

[5] The complainant testified that on 18 October 2013, she was in bed ready to sleep when she heard a noise in the ceiling and it sounded like a swing. Two unknown

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[1] See *Schoombee & another v The State* 2017 (2) SACR 1 (CC) at para 29.

male persons came in through the ceiling. The tallest one switched on the light and opened the wardrobe. He pulled out two zip jackets, a greenwood-proof jacket and a grey one. He opened the cupboards and took groceries and anything he wanted. He pulled the telephone that was on the side of the wall to prevent her from making calls.

[6] Whilst the taller intruder was ransacking the house, the shorter one jumped onto her bed, put his hands around her throat, choked her and had carnal intercourse with her. The other one came back to the room and reprimanded him to stop raping her to no avail. After the second or third rape, he stood next to the bed and that is when she noticed that he had no condom on. She was raped four times.

[7] After they left, she went downstairs for another phone and she called Sunnyside Police Station. The police officers promised to come but after some time they did not arrive, she struggled back to the main bedroom to get her gardener's numbers on the dressing table next to the drawer. She phoned him and reported the matter to him.

[8] She was put in an ambulance and transported to Little Company of Mary Hospital where she was detained for some days.

[9] Detective Sergeant Labuschagne testified that on 18 October 2013, she attended the scene of the crime, interviewed witnesses and arranged for experts. She witnessed a hole in the ceiling of the complainant's bedroom and a duvet which was crumpled up against the wall in the bedroom.

[10] Vikus Viviers, the investigating officer, testified that he took the appellant and accused 2 to Steve Biko Hospital to obtain the DNA samples. He booked the samples both at Sunnyside Police Station and Forensic Science Laboratory. He took the complainant's sexual assault kit to the Forensic Science Laboratory. During cross-examination, it was put to him that the appellant's swaps were never obtained. He was, however, consistent in his version that the swabs were obtained.

[11] Detective Matseko Albertina Nthane testified that on 18 October 2013, she was on duty. She visited the scene and later proceeded to Unitas Hospital to obtain the statement of the complainant. She handed the sexual kit to Dr Kotze who was treating

the complainant. She later received back the kit, which was sealed in a forensic bag, and handed it into the SAP-13 at Sunnyside Police Station.

[12] Dr Shane Kotze testified that he consulted with the complainant on 18 October 2013 and thereafter completed the J-88 form. He noticed multiple injuries consistent with blunt force trauma on the person of the complaint. The injuries he observed on her genitals were consistent with recent forceful penetration.

[13] Warrant Officer van den Heever testified that he is a police officer stationed at the Local Criminal Record Centre. On 18 October 2013, he attended the scene and uplifted the fingerprints from the wooden sliding door in the passage that leads to the dining room and kitchen. On 19 June 2016, he received the appellant's fingerprints and compared them to those found at the scene. He discovered eight matching points of similarity. To ensure that the prints belonged to the appellant, he took his fingerprints in court and pointed out the eight similarities. During cross-examination, it was put to him that the appellant was at the scene of the crime after he was apprehended and that explains how his fingerprints landed at the scene.

[14] The DNA report compiled by Lieutenant Shane Lesley Willem, a forensic analyst, was admitted into evidence as exhibit "Z1" by virtue of section 212 of the Criminal Procedure Act 51 of 1977. He concluded that the DNA reference sample of the appellant matched with the results obtained from the vestibule and vulva swabs of the complainant, and the results obtained from the semen stains on the bed sheet. The sheet was collected at the scene by Oosthuizen.

[15] Dr E G Seller's evidence was not transcribed. It appears from the judgment that he testified that he obtained buccal samples of the appellant and accused 2 and the same were handed in as exhibits "E" and "H" respectively. The version of Veronica Mathonsi, an exhibit clerk, was not transcribed. It, however, appears from the judgment that she received the exhibits from Warrant Officer Viviers and Sgt. Nthane for safekeeping.

[16] The affidavit of Stevens Sekwane, who was called by the complainant after the incident, was admitted into the evidence as exhibit "O" by consent of the parties.

Briefly, he stated that he was called by the complainant and he proceeded to the house. He thereafter called the complainant's son and requested assistance from Mr Wessels. The statement of Mr Wessels was admitted by agreement as Exhibit "N". He confirms that Mr Stevens Sekoane stopped him and requested his assistance. He investigated the scene and remained there until the police arrived. The version of Peter Makwerela was not transcribed, however, it appears from the judgement that he is a police officer in the South African Police Service attached to the tracing unit and he apprehended both the appellant and the second accused.

Evidence for the appellant

[17] The appellant testified that he was at work on the day in issue. He denies any involvement in this matter. He denied that he knew accused 2. He further testified that he was taken to the complainant's house where he was pushed around the house and that this explained how his fingerprints landed at the scene. He denied that the DNA samples were taken from him for testing. During cross-examination, he denied that the bag, jewellery and a duvet he possessed at the time of his apprehension belonged to the complainant.

The law

[18] In *S v Francis*[2] the court considered the powers of an appeal court to interfere with the findings of fact of a trial court and stated the following:

> "The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional

[2] 1991 (1) SACR 198 (A) at 198j – 199a.

circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

Analysis

[19] Counsel for the appellant submitted that there is insufficient evidence to prove that the complainant was sexually penetrated on four different occasions. The complainant testified that she was penetrated sexually on four different occasions and that after the second or third act of rape, she realised that her assailant was not using a condom. This issue was not canvassed by the appellant's legal representative during cross-examination of the complainant but was raised for the first time on appeal. Counsel for the appellant did not argue that the complainant was an unreliable witness, and failed to advance reasons why this court should doubt her version in this regard. I am, therefore, not persuaded by the submissions of counsel for the appellant in this regard and the same falls to be rejected.

[20] Counsel for the appellant, correctly in my view, avoided arguing strongly about the evidence that links the appellant to the offences with which he has been convicted, viz, the DNA and fingerprint evidence. In my view, the court a quo correctly rejected the version of the appellant that his fingerprints were planted at the scene when he was taken there after his arrest because the fingerprints that matched his were uplifted before he was taken to the scene.

[21] Therefore, the appeal against conviction falls to be dismissed.

Sentence

[22] In *S v Bogaards*[3] the court in dealing with the appellate court's powers to interfere with the sentences imposed by courts below stated as follows:

> "Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have

[3] 2013 (1) SACR 1 (CC) at para 41.

imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

[23] In considering the appropriate sentences, the court a quo considered the mitigating and aggravating circumstances. The complainant was a 92-year-old woman. She was strangled and lost consciousness. She sustained multiple injuries and was penetrated on four different occasions by the appellant. She later suffered a stroke. She was attacked in the sanctity of her home.

[24] In *S v Chapman*[4] in dealing with the plight of women stated as follows:

> "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 tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminish the quality and enjoyment of their lives."

[25] The court a quo correctly considered all circumstances impacting the appellant's personal circumstances and the interests of the community. It took into account the period the appellant spent in custody awaiting trial, that there is a thirty-year age difference between the appellant and the complainant and that despite the overwhelming evidence against him, he maintained his innocence. It was against this backdrop that the court a quo found that there existed no compelling and substantial reasons to deviate from the prescribed minimum sentences.

[26] In *S v Malgas*[5] the court in dealing with the interpretation and application of the minimum sentencing legislation held as follows:

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[4] 1997 (3) SA 341 (SCA) at 344I-345B.
[5] [2001] 3 All SA 220 (A) at para 25.

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary -

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the

need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the legislature has provided."

[27] In my view, the court a quo was correct in finding that there are no substantial and compelling reasons warranting a deviation from the prescribed minimum sentences.

[28] Counsel for the appellant submitted that the court a quo misdirected itself by not taking all counts of rape as one for the purposes of sentencing. It is clear *ex-facie*

the record that the court a quo erred in not taking all counts of rape as one for the purposes of sentence. It follows that the appeal against sentence falls to be upheld.

Order

1. Appeal against conviction is dismissed.

2. Appeal against sentence is upheld. The order that the appellant is sentenced to life imprisonment in respect of each count of rape is set aside and substituted with the following:

   "*Counts 1-4 are taken together for the purposes of sentence, and the appellant is sentenced to life imprisonment antedated to 13 July 2017.*

   Count 5 the appellant is sentenced to 12 years' imprisonment. The sentence in count 5 is ordered to run concurrently with the sentence meted out in counts 1 - 4 by virtue of section 28 of the Criminal Procedure Act 51 of 1977 as amended."

3. In terms of section 103 of the Firearms Control Act 60 of 2000, the appellant is declared unfit to possess a firearm.

P J M MOGOTSI
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearance

For the appellant:	Adv J L Kgokane
Instructed by:	Legal Aid South Africa, Pretoria
For the respondent:	Adv G J C Maritz
Instructed by:	Director of Public Prosecution, Pretoria