IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA&R 112/2021

THANDISIZWE GQIKA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LAING J

[1] This is an appeal against conviction and sentence of the appellant in the Gqeberha Regional Court.

[2] The appellant was charged with rape, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with sub-section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He was convicted and sentenced to 20 years' imprisonment.

[3] The incident occurred on or about 5 October 2020 when the appellant met the complainant for the first time at a tavern. Later that night, the appellant invited the complainant to join him for a smoke in his taxi, whereafter they departed for his flat. Whether the complainant accompanied the appellant willingly and whether they had sexual intercourse at his flat were both issues in dispute before the court *a quo*.

The evidence of the parties in the court *a quo*

[4] The complainant testified that she had objected to being driven away and had asked the appellant to return to the tavern. The appellant did not respond, whereupon the complainant called her friend, prompting the appellant to snatch her phone away from her. He was aggressive towards her. In contrast, the appellant testified that the complainant had never objected. There was an understanding between the two of them that they would have intercourse at the appellant's flat and that he would take her home in the morning.

[5] Describing events at the flat, the complainant testified that the appellant had removed her underwear forcefully. She had removed her dress herself because it was very special to her and she did not want the appellant to touch it. He had pushed her onto his bed and spread her legs, whereupon she asked him to wear a condom. The appellant left the bedroom. Upon his return, the complainant begged him not to have intercourse with her and asked to use the toilet, where she pretended to urinate. When she returned to the bedroom, the appellant inserted his fingers into the complainant's vagina, against her will. She attempted to devise a way in which to turn him off and said that she needed her asthma pump, which the appellant simply rejected. Thereupon the complainant asked for a bucket because she wished to vomit. She vomited twice. The complainant stated that she had requested the appellant, on several occasions, to take her home but he had refused. She had also begged the appellant continuously not to go ahead with his intentions. The appellant appeared to have relented and said that the complainant should stop wasting his time. However, just before falling asleep and while they were both lying on the bed, the appellant opened the complainant's legs again and inserted his penis into her vagina. She had not been lubricated, causing the appellant to insert his penis a second time. He fell asleep soon afterwards. The complainant confirmed that the appellant had been under the influence of alcohol.

[6] For his part, the appellant's version was that after the complainant had removed her dress, she started to vomit. She returned from the bathroom and asked the appellant to use a condom, which he retrieved from a neighbouring room. The complainant vomited a second time. After that, she asked for her phone because she

was worried that her sister would have been wondering what had happened to her. The appellant found the complainant's phone and gave it to her. He said that the appellant began to vomit for a third time, whereupon he went to sleep while she was in the bathroom. He had been highly intoxicated and had lost patience with the complainant's vomiting. The appellant denied having penetrated the complainant, he said that he could not proceed to have intercourse with her because she had been ill.

[7] Turning to what happened later that night, the complainant testified that she had charged her phone and then used it to contact her friend, Ms Bontle Monahadi, while the appellant was asleep. She said that she had been raped. When her friend asked whether she should call for the police, the complainant said yes and sent her a location pin. While waiting for them to arrive, the complainant called her sister. Eventually, Ms Monahadi arrived with the police, whereupon the complainant woke up the appellant and said that he should let them inside. This was at about 5.00 am. The police arrested the appellant and took the complainant to the Dora Nginza Hospital for a medical examination. She confirmed that she did not sustain any injuries but took anti-retroviral medication, which made her nauseous, and sought counselling from a private psychologist. The experience had left her traumatised and had affected her relationship with her boyfriend.

[8] Ms Monahadi testified on behalf of the State. She confirmed that she had received a strange call from the complainant in the early hours of the morning. The complainant had been whispering and had sounded scared, prompting Ms Monahadi to ask what was wrong. The complainant indicated that she had been raped and asked her to call the police and to fetch her as soon as possible. She had also told Ms Monahadi that it was not safe for her to come alone because the appellant had threatened to shoot anyone who attempted to fetch her. After some delay, Ms Monahadi managed to persuade the police to accompany her to the appellant's flat, using the location pin provided by the complainant. Upon their arrival, they found the complainant in a state of hysteria and crying. During cross-examination, Ms Monahadi was adamant that she had not suggested that she call the police; the complainant had requested her to do so immediately, during their conversation on the phone.

[9] The appellant stated that he had not been able to take the complainant home; he had been very drunk at the time. He had told her that he would take her home in the morning. Later, the complainant had woken him up and said that the police had arrived and that he should let them inside. The police had searched for a firearm and just as they were about to leave, they had returned and arrested him after having been told that the complainant had been raped.

[10] A forensic nurse, Sister Mookiekazi Qwebalele, testified that she was based at the Thuthuzela Care Centre, Dora Nginza Hospital. She had completed a J 88 - medical report after having examined the complainant. She had not noticed any gynaecological or other injuries but the complainant had informed her that a man whom she had met at a tavern had inserted his finger into her vagina and had later penetrated her with his penis. Sister Qwabalele stated that it was possible for penetration to have occurred with either a finger or a penis but not to have caused any injuries.

The issues and the approach to be taken on appeal

[11] The issues in this matter were essentially whether the parties had sexual intercourse and, if so, then whether the complainant had consented thereto. However, the approach to be taken by a court of appeal has been described in E du Toit et al *Commentary on the Criminal Procedure Act* (Jutastat, 31 January 2021) as follows:

> "A court of appeal is aware that in principle a trial court is in a better position than the court of appeal to make reliable findings of fact. The court *a quo* indeed sees and hears the witnesses and is steeped in the atmosphere of the trial. In addition, the trial judge is in a position to take into account a witness's appearance, demeanour and personality. For these reasons a court of appeal would not be inclined to reject a trial judge's findings of fact... On the other hand, if such findings are plainly wrong, the court of appeal will indeed interfere… However, it is not enough that, after a careful trawling through the whole of the transcript and exhibits, a court of appeal thinks that it might

> have come to different factual conclusions… A court of appeal would be even more opposed to overturning findings of fact that are based on oral evidence."[1]

[12] In the case of *S v Hadebe and others* 1997 (2) SACR 641 (SCA), Marais JA held, at 645e-f, that:

> "…there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary."

Findings on conviction

[13] The magistrate heard the evidence of the parties and other witnesses, carefully examined same, and prepared a comprehensive and well-reasoned judgment. She found that the complainant's conduct was not of a person who had agreed to go to the appellant's flat; her conduct of contacting her friend, Ms Monahadi, reporting the rape to her, and requesting her to call the police, was not consistent with someone who had consented to intercourse. There was no evidence to the effect that the complainant stood to gain or benefit from accusing the appellant of rape. The magistrate found that she had been a good witness and that she had told the truth.[2] It was improbable that the complainant had consented to intercourse once she realised that her sister would start to wonder what had happened to her. The appellant would have realised, too, that the complainant did not want to be at his flat, did not want intercourse, and wanted to be taken home. The appellant's version, as the accused, was not reasonably possibly true.

---

[1] See *R v Dhlumayo and another* 1948 (2) SA 677 (A) 705-6; *S v Robinson and others* 1968 (1) SA 666 (A) 675G-H; S v Siphoro (unreported, GJ case no A399/2012, 14 August 2014); *S v Mshudulu* (unreported, WCC case no A137/2013, 4 November 2014); and *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A).

[2] At 108-110 of the record.

[14] In *S v Francis* 1991 (1) SACR 198 (A), Smalberger JA summarised the approach of an appeal court to findings of fact by a trial court, at 198i-199a:

> "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 cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony."

[15] The appellant in this matter argues that the evidence of the complainant, as a single witness, should have been treated with caution. The medical report was a neutral factor in the proceedings. Furthermore, argues the appellant, there was not enough evidence to sustain a conviction and the magistrate misdirected herself in finding that the State had proved its case against the appellant beyond reasonable doubt.

[16] Having regard to the record, this court is satisfied that the complainant's evidence was properly treated and accepted. There was no dispute that the complainant had met the appellant for the first time at the tavern, that night. It was not disputed that, at the appellant's flat, the complainant had vomited and had visited the bathroom on several occasions. It was not disputed that she had been anxious and had worried that her sister would wonder where she was. It was also not disputed that the complainant had contacted Ms Monahadi and that the police had been called. The testimony of Ms Monahadi to the effect that the complainant had been whispering over the phone and had been hysterical and crying upon the former's arrival at the flat supported the inference that something untoward had happened to the complainant and that, in the event that intercourse had occurred, she had not provided any consent thereto.

[17] The J 88 -medical report did not record any injuries. However, Sister Qwabalele testified that this did not exclude the possibility of penetration. Moreover, the

complainant had told her directly that the appellant had inserted his finger and then his penis into her vagina. When taken together with the complainant's evidence and that of Ms Monahandi, the report is more than merely a neutral factor; it serves to lend credibility to the complainant's testimony and to undermine the appellant's version of the events that took place on the night in question.

[18] Overall, the evidence points to a situation where the complainant found herself being taken unwillingly to the appellant's flat after having shared a smoke with him at a tavern. Despite protestations from the complainant, the appellant made it very clear that he wanted intercourse with her and was not deterred, initially, by her attempts to put him off. Inasmuch as the complainant's vomiting may have served to delay proceedings, the appellant took his chances when the opportunity presented itself, while both parties were lying naked on his bed. It was the complainant's reaction, afterwards, that seemed to have removed any doubt in the magistrate's mind about the guilt of the appellant. Her contacting her friend, Ms Monahandi, requesting that the police be called, and sending her location pin, was conduct that was simply not consistent with someone who had consented to intercourse.

[19] In the circumstances, this court finds no reason why not to presume that the findings of fact made by the court *a quo* are correct or why to disregard same. There is no indication of a demonstrable and material misdirection. Whereas a court of appeal enjoys a somewhat wider discretion to interfere with findings in relation to inferences and probabilities,[3] the conclusions reached by the magistrate are supported by the evidence. There is no basis upon which to challenge these.

Findings on sentence

[20] With regard to sentence, the court *a quo* enjoys pre-eminent discretion and the court of appeal will not lightly interfere with the exercise of same.[4] Du Toit describes the approach to sentence on appeal as follows:

[3] To that effect, see *S v Horn* 2020 (2) SACR 280 (ECG) at [74] and *Minister of Safety and Security and others v Craig and others NNO* 2011 (1) SACR 469 (SCA) at [58].
[4] See *S v Romer* 2011 (2) SACR 153 (SCA); *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

> "The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the interest of justice to alter it."[5]

[21] The appellant has argued that the court *a quo* was correct in finding substantial and compelling circumstances, which included the fact that the appellant was employed at the time, he is a first offender, and he is the father of two minor children. Nevertheless, in light of all the factors placed on record, together with the appellant's personal circumstances, it was contended that the court *a quo* imposed an overly harsh sentence.[6]

[22] In her determination of sentence, the magistrate unmistakeably took into consideration the factors mentioned by the appellant, viewing them as substantial and compelling circumstances that justified a departure from the prescribed minimum sentence. Nevertheless, she remained of the view that the offence required the imposition of a lengthy term of imprisonment, owing to the seriousness of its nature.[7]

[23] The offence of rape, in a situation such as the present,[8] attracts a sentence of imprisonment for life. This is the prescribed minimum sentence. In *S v Singh* 2016 (2) SACR 443, Tshiqi JA held, at [23], that:

> "The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence is shockingly inappropriate."

---

[5] See *S v Fhetani* 2007 (2) SACR 590 (SCA); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA); *S v Anderson* 1964 (3) SA 494 (A); *Nevilimadi v S* [2014] ZASCA 41 (unreported, SCA case no 545/13, 31 March 2014; *S v Asmal* [2015] ZASCA 122 (unreported, SCA case no 20465/14, 17 September 2015).

[6] The appellant referred to *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Fazzie* 1964 (4) SA 684; and *S v Malgas* 2001 (1) SACR 469 (SCA) in argument. The authorities in question deal with the principles applicable to a departure from a prescribed minimum sentence and the consequences of not affording proper weight to any factor that is relevant to the imposition of sentence. They do not serve to advance any contentions to the effect that the court *a quo*, in this matter, misdirected itself.

[7] At 127 of the record.

[8] See sub-section 51(1) of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2 thereto. The complainant was raped more than once. The meaning of rape, in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with section 1, includes the insertion of a finger into another person's vagina, as was the situation here.

[24] The magistrate departed from the prescribed minimum sentence and imposed a sentence of 20 years' imprisonment. For a person of the appellant's age,[9] this is significantly less than a sentence of life imprisonment. Whether another court would have been prepared to have departed from the prescribed minimum sentence is a question that this court finds unnecessary to explore further; the actual sentence meted out to the appellant was a lengthy term of imprisonment but it can certainly not be deemed to be overly harsh.

Relief and order to be granted

[25] Having had regard to the record and the arguments led on behalf of the appellant and respondent, respectively, the court is satisfied that there is no basis upon which to interfere with the findings of the court *a quo*.

[26] Accordingly, I hereby dismiss the appeal against both conviction and sentence.

_____

JGA LAING

JUDGE OF THE HIGH COURT

I concur.

_____

M MFENYANA

ACTING JUDGE OF THE HIGH COURT

[9] The appellant was 36 years old at the time that sentence was handed down in the court *a quo*.

APPEARANCE

Counsel for the appellant	:	Adv Charles, instructed by The Legal Aid Board, Grahamstown.
Counsel for the respondent	:	Adv Zantsi, instructed by the Director of Public Prosecutions, Grahamstown.
Date of hearing	:	09 February 2022
Date of delivery of judgment	:	01 March 2022