REPUBLIC OF SOUTH AFRICA

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

Case No: CA & R 124/2021

In the matter between

MLUNGISI MANELI **APPELLANT**

and

THE STATE **RESPONDENT**

APPEAL JUDGMENT

MFENYANA AJ

Introduction

[1] The appellant was convicted by the Regional Court, Port Elizabeth on a cout of Rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

[2] He was sentenced to 10 years' imprisonment. He brought an application for leave to appeal against his conviction and sentence.

[3] The issue that arises from this appeal is whether the court *a quo* misdirected itself in various respects, particularly the following:

(a) In its analysis and evaluation of the evidence in this matter and in arriving at a conclusion that the appellant's evidence could not be relied on notwithstanding the fact that the complainant was a single witness.

(b) In not attaching sufficient weight to the contradictions in the State's case.

(c) In imposing the prescribed minimum sentence without giving proper consideration to the personal circumstances of the appellant and as such rendering the sentence imposed grossly disproportionate to the offence.

Facts

[4] The applellant and the complainant met at a local tavern where the complainant was drinking with four of her friends. The complainant ended up in the appellant's car and at which point the complainant and the appellant had sexual intercourse. The details of how the complainant ended up in the appellant's car are in dispute, and so is the sexual intercourse, with the appellant contending that it was consensual, while the complainant avers that the appellant sexually violated her and that the sexual intercourse was against her will. According to the complainant, the appellant had offered to take the complainant and her friends to another tavern after which he would take them to their respective homes. He suggested that the complainant accompany him to fetch his 'kombi' as they could not all fit in the small car he was driving at the time. When one of her friends also

expressed an interest to go with them, the appellant rejected the suggestion, opting to go with the complainant alone.

[5] On the way to fetch the kombi, the complainant became suspicious as they had been driving for a long time and decided to enquire from the appellant how far the kombi was and demanded to be taken back to her friends. A fight ensued and the appellant assaulted the complainant with one hand while driving with the other. He called her derogatory names. He drove to a bushy area, stopped the car and ordered the complainant to alight. When she refused, the appellant pushed her out of the car, undressed her top and ordered her to take off the rest of her clothes. The complainant refused. The appellant undressed her and raped her.

[6] The appellant's version on the other hand, is that the complainant is his ex-girlfriend and neighbour. On the day in question he met the complainant and four or five of her friends near his home. They requested him to take them to their homes. At first he refused as the complainant's home was nearby, but later agreed. As he was about to drop the complainant off at her home, she suggested that he should first drop her friends off and so he did. On their way back he bought the complainant some alcohol which she consumed. The complainant told him that she was missing him and insisted that they should have sexual intercourse. They stopped on the way and had sexual intercourse on the grass at Boy Street near an old age home. He thereafter took the complainant home. In essence the appellant's case is that he and the complainant had consensual sexual intercourse.

Analysis and evaluation of evidence

[7] In convicting the appellant the court *a quo* considered the fact that the complainant was a single witness; that her evidence should be treated with caution and must be satisfactory in all material respects. The court *a quo* found

the evidence of the complainant to be reliable. The court further found that the complainant's testimony that the appellant had forcibly had sexual intercourse with her, which resulted in her sustaining injuries to her mouth and face was corroborated by the appellant's mother who testified to the injuries on the complainant's face. The learned Magistrate found the injuries (which the complainant resulted from an assault by the appellant), to be inconsistent with consensual sexual intercourse as stated by the appellant. This was not explained by the appellant. In this regard the court *a quo* found that the appellant's explanation in rebuttal did not make sense and could not reasonably possibly be true in light of the evidence adduced in the case as a whole. In particular, the appellant's version that the complainant fabricated the charges against him because she was afraid of her father as he is very strict. The learned Magistrate correctly rejected this version as a fabrication.

[8] As far as the appellant's submission in respect of contradictions in the state's case is concerned, the court *a quo* relied on the decision of the SCA in *Garg v The State*[1], and held that the evidence of the complainant should not be rejected on the basis of minor discrepancies and contradictions. I align myself with this proposition.

[9] In respect of the evaluation of evidence, the court *a quo* considered the correct approach to be followed in evaluating the evidence before it by making specific reference to *S v Tshabalala*[2] where the SCA held that factors which point to the guilt of an accused person must be weighed up against all the factors that point to his innocence, taking into account strengths and weaknesses on both sides as well as probabilities and then decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

[1] 2006(1)SA 547 (SCA)
[2] 2003(1) SACR 134 (SCA)

Having done so, the court *a quo* found that the state had proved its case beyond a reasonable doubt.

Sentence

[10] In sentencing the appellant, the court a quo took into account the personal circumstances of the appellant; *inter alia* his age, marital status and the fact that he had minor children for whom he was paying maintenanmce, was self-employed and a breadwinner, as well as his state of health. The court further considered that the appellant's previous convictions are more than ten years and therefore no weight could be attached to them.

[11] As far as the seriousness of the offence is concerned, the court considered the prevalence and the crime of rape throughout the country, as the reason for the prescription of minimum sentences by the legislator. The court held that the violence associated with the crime of this nature often results in physical and psychological trauma as well as the violation of the victims's privacy and dignity and the fact that in this case, the complainant was dragged out of the car, sworn at and grossly and disgustingly violated by the appellant. The learned Magistrate found that the appellant had planned the attack on the complainant as he tricked her into believing that they were going to fetch his kombi.

[12] Lastly, the court *a quo* considered that the interests of society required that the courts, as representatives of society should impose meaningful sentences while on the other hand allowing the accused person to mend his ways. The learned Magistrate found that there were no substantial and compelling circumstances present, to warrant a deviation from the prescribed minimum sentence. "Even the accumulative effect of the mitigating factors advanced to by the defence counsel does not justify such a departure", the court held.

[13] It is trite that in the absence of factual error or a misdirection on the part of the trial court, the findings of the trial court are presumed to be correct. *Du Toit et al*[3] states:

> "Only where the the court of appel is persuaded that the conclusions of the trial court are incorrect, will it be overturned. ….It is not sufficient to raise a reasonable doubt about the correctness of trial court's acceptance of the evidence of a witness.The court of appeal will moreover refrain from speculating about possible explanations which were not even raised by the appellant."[4]

[14] It is also trite that the imposition of sentence is a prerogative of the trial court. An appeal court will not interfere with a sentence imposed by a trial court, unless it is of such a nature that no reasonable court ought to have imposed it, and is thus grossly excessive, or there was an improper exercise of the discretion by the trial court, or the interests of justice require it.

[15] The consideration is not whether the court of appeal would have imposed a lighter sentence if the punishment were within its discretion, but that the sentence must reflect the blameworthiness of an offender and should be proportional to what an offender deserves. It should have regard to, and serve the interests of society. In so saying, the court of appeal can only interfere in circumstances where the sentence is shockingly inappropriate or in the event of a misdirection by the trial court. I do not find to be the case in the present matter.

[16] Trollip JA in *S v Pillay*[5] clearly sets out what the determination whether or not a misdirection has occurred entails when he states:

[3] Commentary on the Criminal Procedure Act
[4] [Service 61,2018], 30-41; See also: S v Ntsele 1998(2) SACR 178 (SCA; S v Francis 1991 (1) SACR 198 (A)
[5] 1977 (4) SA 531 (A) at 553E-F

> "… the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[17] In my view, the learned Magistrate carefully and comprehensively considered the totality of the evidence, as well as all factors that weigh both in favour of and against the appellant. He considered the personal circumstances of the appellant in a bid to determine whether any substantial and compelling circumstances could be found and found none; correctly in my view. He did not emphasise one factor over others and gave a balanced view of the matter.

[18] I am thus persuaded that the findings of the court *a quo*, both on conviction and sentence were well reasoned and appropriate in the circumstances. I can therefore find no reason to interfere with the decision of the court *a quo*.

In the result the following order is made:

The appeal is dismissed.

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SM MFENYANA
ACTING JUDGE OF THE HIGH COURT

I agree

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the appellant	:	Mr. Sojada, instructed by the Legal Aid Board, Grahamstown
Counsel for the respondent	:	Adv Obermeyer, instructed by the Director of Public Presecution, Grahamstown
Date of hearing	:	09 February 2022
Date of delivery of judgment	:	01 March 2022