IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO : CA&R 84/2016

Date heard : 27 July 2016
Date delivered : 17 October 2016

In the matter between :

SIYABULELA NOJOKO **Appellant**

and

THE STATE **Respondent**

JUDGMENT

RUGUNANAN, AJ :

[1] This is an appeal against conviction and sentence with the leave of the trial court. The appellant was convicted and sentenced by a Regional Court Magistrate in Port Elizabeth as follows :

- Count 1 : Rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007) read with the provisions of section 51 and Schedule 2 of the Criminal Law

Amendment Act (Act 105 of 1997), for which offence a sentence of life imprisonment was imposed;

- Count 2 : Kidnapping; and

- Count 3 : Assault with intent to commit grievous bodily harm.

Counts 2 and 3 were taken together for the purpose of sentence and attracted a sentence of 5 years' imprisonment. Except for count 3 in which it is alleged that the offence was committed on 4 November 2012, the offences on the remaining counts fall within the period 2 to 8 December 2012. The appellant was legally represented at his trial. He pleaded not guilty to each count without having disclosed the basis of his defence.

[2] It is mentioned at the outset the conclusion reached in this judgment renders it unnecessary to recapitulate in full detail the evidence contained in the record of the trial proceedings. It is considered appropriately useful however to repeat the legal principles dealing with an assessment of the evidence, as are applicable to the circumstances of this matter.

[3] The fundamental rule governing the hearing of appeals was succinctly set out in *S v L.* 2011 (1) SACR 87 (ECG) at paragraph [8] as follows :

> *"The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise*

the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well known cases of R v Dhlumayo and Another 1948(2) SA 677 (A) at 705 and the passages which follow; S v Hadebe and others 1997 (2) SACR 641 (SCA) at 645; and S v Francis 1991 (1) SACR 198 (A) at 204c-f. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions."

[4] Before us counsel for the appellant did not contend that the trial court's findings are vitiated by irregularity. He confined his argument to the submission in his heads that the trial court should have found that the appellant did not rape, kidnap and assault the complainant, thus essentially suggesting that there exists a reasonable possibility that the appellant's evidence may be true. Accordingly, that is the question this court is seized with and the approach to be adopted is guided by the ensuing legal principles.

[5] Tritely, a court must look at all the evidence holistically to determine if the State has proven the guilt of an accused beyond reasonable doubt. Breaking

down the evidence in its component parts is not excluded as a convenient aid to a proper evaluation and understanding of the evidence. In *S v Shilakwe* 2012 (1) SACR 16 (SCA) at paragraph [11], the following is stated :

> *"But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees."*
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> See also *S v Hadebe & Others* 1998 (1) SACR 422 (SCA) at 426 F-H and *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110, para [57].

[6] It is also trite that no *onus* rests on an accused to convince the court of the truth of any explanation which he gives. He should be acquitted if there exists a reasonable possibility that his evidence may be true (see *R v Difford* 1937 AD 370 at 373; and *S v Kubeka* 1982 (1) SA 534 WLD at 537 F- G).

[7] The *dicta* in these cases suggest that the approach adopted when assessing the evidence entails a weighing of all the elements pointing towards

the guilt of the accused against those elements which are indicative of his innocence. In this process, the inherent strengths and weaknesses, probabilities and improbabilities on both sides must be properly considered, and once having done so, it must be determined whether the balance weighs so heavily in favour of the State such that it excludes any reasonable doubt that the accused is guilty (see *S v Chabalala* 2003 (1) SACR 134 (SCA) paragraph [15]).

[8] On each of the abovementioned counts the complainant is essentially a single witness. Section 208 of the Criminal Procedure Act 51 of 1977 ('the CPA') provides that an accused may be convicted of any offence on the single evidence of a competent witness. Although there is no rigid formula for considering the credibility of a single witness, a trial court should weigh the evidence of a single witness and consider its merits and demerits and once having done so, should decide whether it is satisfied that it is truthful despite shortcomings or defects (see *S v Sauls and Others* 1981 (3) SA 172 (AD) at 180E-G followed in *Director of Public Prosecutions v S* 2000 (2) SA 711 (TPD) at 714 F). Stated otherwise, a trial court may accept the evidence of a single witness if it inspires confidence that it is clear and satisfactory in every material respect. (see *S v Letsedi 1963 (2) SA 471(AD) at 473F-G and S v Khumalo en Andere 1991 (4) SA 310 (AD) at 327J*).

[9] Traversing only the relevant portions of the evidence on record, the complainant testified that the appellant was her former boyfriend with whom she had a relationship that began in 2009 and ended approximately 3 months prior to

2 December 2012. On the night of 2 December 2012 she was at a tavern in the company of her new boyfriend one G. N.. They were confronted by the appellant who drew a knife in a threatening manner. N. fled. The appellant forced the complainant to accompany him to his home and, along the way assaulted the complainant using his fist. On arrival the appellant forcefully threw the complainant into his living quarters (a shack situated on the same erf as the main house occupied by his mother) where he assaulted her on her back with an iron rod and with a fist on the mouth and around her eye.

[10] The complainant testified that for several days she was kept under constant watch by the appellant and at times locked up when he went away. During this period she stated that her cellphone was thrown by the appellant onto the roof of the shack; she was naked, her clothing taken from her and kept in the main house and she was repeatedly physically assaulted, raped by the appellant and threatened that her eyes would be carved out with a knife. The appellant would bring meals from the main house; but as for her toilet routine she was obliged to urinate in a bucket kept in the shack and if she required other relief the appellant would accompany her to the toilet in the main house.

[11] The complainant eventually summoned a neighbour, N. L., who opened the shack and assisted her to retrieve her clothing from the main house. Save to state that L., who testified for the State, confirmed that she so assisted the complainant on 8 December 2012 and noticed the complainant was naked and presented with a swollen face and bloodstained nose, it is considered

unnecessary to traverse L.'s evidence in any particular detail. After the complainant retrieved her cellphone from the roof she went to N. and reported what had happened to her. While at N.'s place, she received a call from someone purporting to be a policeman and at the caller's request she went to the appellant's home only to discover that the appellant tricked her. She was again assaulted with an iron rod and raped. At some point thereafter the appellant received a call on his cellphone and was required to attend to other business elsewhere. This interval presented the complainant with opportunity to escape, report her experience to the police and be medically examined.

[12] A 'J88' medical report dated 9 December 2012 was handed in by agreement between the parties. It is considered adequate to mention only that the report details *inter alia* the complainant's emotional status on examination was noted to be *"traumatised"* and *"distressed"*; that she presented with a bruised left eye, a swollen upper lip and concludes with a finding consistent with *"blunt force to face and back"* and *"rape not excluded"*.

[13] Regarding the assault of 4 November 2012, the complainant's evidence was that after a daytime outing at the beach she visited a tavern that night and was confronted by the appellant who assaulted her by hand on various parts of her body and forcefully dragged her by the hair to his home. She stated that she sustained bruises on various parts of her body, notably the chest and abdominal regions. It must added that the appellant's version on this count was a denial premised on an assertion that he had no recollection of the incident. His version

regarding events for the period 2 to 8 December, fundamentally is that both he and the complainant were still involved in a relationship with each other; that sexual intercourse between them was entirely consensual and although he did assault her by grabbing her hair (on another occasion, but not 4 November 2012), he did so because he was overcome by jealousy because he believed the complainant had a liaison with one 'Kaptein' during a weekend when his efforts to contact her came to naught. It is evident from the version of the appellant that much of what the complaint testified was not disputed, in particular that she was at his shack for the duration of the aforementioned period, that her clothing was taken from her, that she had been attentively watched and threatened by him and at times locked inside when he went away.

[14] Although cross-examined on discrepancies emerging from her evidence in chief *vis-à-vis* her written statement to the police, a perusal of the record reflects that the detail taken up with the complainant, such as the number of times she alleged she was raped during the relevant period, the frequency and manner of assaults and the circumstances of her escape, were peripheral and did not materially detract from the substance of her version presented in oral evidence. She attributed discrepancies to the fact that she was simultaneously interviewed by three police officers at the time when the statement was taken. Neither evidence such as the complainant's state of mind nor of the broader circumstances attendant on the execution of the statement as would cast doubt as to the accuracy of the events in question or of her overall credibility, was elicited during cross-examination.

[15] On the appellant's version being put to the complainant she refuted any suggestion that she willingly accompanied him to his shack, had consensual sexual intercourse with him and stayed with him for any particular length of time on her own will. On a reading of the appellant's evidence it is immediately apparent that much of his version was not pertinently put to the complainant during cross-examination, particularly his assertion that she was the one who threw her cellphone onto the roof of the shack in order to conceal the identity of a caller. In any event, it bears mention that a reading of the appellant's evidence reflects an emphasis on irrelevant matter, a tendency to prevaricate and to avoid pertinently answering straightforward questions, this even on clarification by the magistrate. Doubtless the record tells of the appellant being an unimpressive witness.

[16] G. N. also testified in support of the State's case. He essentially confirmed that on 2 December 2012 he was at the time involved in a relationship with the complainant for some 3 months, that at a tavern both he and the complainant were confronted by the appellant who was armed with a knife and threatened them. It was the first time he encountered the appellant and he took flight for his own safety. He stated that the complainant returned about 9 December 2012, that she had a swollen eye and explained that she was assaulted and raped.

[17] Having carefully examined the evidence on record with the scrutiny postulated by the various authorities referred to, it cannot be said that the trial

magistrate was wrong in his findings. He found that the evidence of the complainant, who was in the main a single witness, was satisfactory in material respects and that she was a reliable witness notwithstanding the apparent contradictions accentuated during her cross-examination. Factoring those aspects of the evidence by the witnesses L. and N., (whom the magistrate found to be honest witnesses), where these aspects corroborated the complainant's version, the magistrate correctly found that their evidence minimised the risk that is inherent in the evidence of a single witness. He reasoned correctly that such evidence indicated the complainant's version was not a mere fabrication.

[18] Looking at the appellant's version, the magistrate considered that the medical report together with the evidence by N. and L. corroborated the complainant and displaced the appellant's version that he did not assault her in the manner described and that he did not have forceful sexual intercourse with her. On the magistrate's assessment, the probabilities were such that they rendered the appellant's version on all counts false beyond doubt. Taking all factors and evidence into account, the magistrate's findings are unassailable and in the circumstances the appeal against the convictions must fail.

[19] On the question of sentence, it was contended by appellant's counsel that the sentence on count 1 is open to interference in that the magistrate ought to have found that the cumulative aggregate of the his personal circumstances amounted to substantial and compelling circumstances as would justify a departure from the prescribed sentence imposed.

[20] The appellant testified in mitigation. His evidence discloses that he was aged 29 at the time of his trial, that he has a standard 8 L.l of education, is unmarried and has no minor children. The evidence further indicates that he grew up without a father but has a mother who earns a living as a hawker. He was in custody for almost two years awaiting trial and prior thereto he enjoyed permanent employment as a taxi driver earning an income of R400.00 per month. The State proved no previous convictions against the appellant.

[21] The approach applicable to the enquiry into the existence of substantial and compelling circumstances was laid down in *S v Malgas 2001 (1) SACR 469 (SCA)* and endorsed by the Constitutional Court in *S v Dodo 2001 (1) SACR 594 (CC)*. The approach finds resonance in several decisions of the Supreme Court of Appeal, notably*; S v Fatyi 2001 (1) SACR 485 (SCA); S v Vilakazi 2009 (1) SACR 552 (SCA) and S v Matyiyi 2011 (1) SACR 40 (SCA)*.

[22] In attenuated form, the approach is set out as follows :

- A court has a duty to consider all the circumstances of the case cumulatively, including factors traditionally taken into account, such as the personal circumstances of the accused, the crime committed and the legitimate interests of society; this aims at testing the proportionality of the prescribed sentence *(see Luthando Mqikela v S Case No 119/07 (ECHC), delivered 26 October 2009);*

- For the circumstances to qualify as substantial and compelling, they need not be exceptional in the sense of seldom encountered or rare, nor are they limited to those which have a diminishing effect on the moral guilt of an offender;

- The sentencing legislation is intended to ensure a severe, standardised and consistent response from the courts unless there were truly convincing reasons for a different response. Put differently, the mandatory sentences are to be regarded as generally appropriate for the specified crimes and should not be departed from without weighty justification; and

- Where a court is convinced, after considering all the circumstances, that the imposition of the minimum sentence would be unjust, only then is it entitled to characterise the circumstances as substantial and compelling.

[23] With these prescripts in mind, the enquiry as to the existence of substantial and compelling circumstances is considered in relation to what is set out in the ensuing paragraphs.

[24] Turning to the appellants age, he is clearly not a youth; but the absence of evidence of his L.l of maturity or any other influence in his life experience which may have been of assistance for determining sentence, renders it doubtful if his age has any inherent mitigatory value. By itself the appellant's age,

insubstantiated by such detail, is a chronological calibration that assumes neutral significance *(*see *S v Matyiyi supra at 48 a-c).* So does the fact that the appellant grew up without a father, particularly where this evidence is not supported by any detail of how the absence of a father might have influenced his life experience, outlook and especially his attitude towards women. On the latter aspect it bears mentioning the evidence on record reveals that the assaults on the complainant, her enforced deprivation of freedom and repeated rapes were tormenting, callous and perpetrated with a flagrant disregard for the sanctity of her physical and mental integrity. A society striving towards the ideals of equality and dignity does not sit back and adopt a passive and indulgent approach to crimes of violence against women. This kind of brutality has unfortunately become a regular occurrence of life in South Africa and courts are enjoined to signal a clear message that such behaviour will not escape the full force and effect of the law *(*see *DPP Kwazulu-Natal v Ngcobo 2009 (2) SACR 361 (SCA) at 367 g)*.

[25] As a matter of course, when considering sentence, a court will have regard to the period an accused person has endured in custody while awaiting trial. The appellant was convicted and sentenced on 25 November 2014 and was in custody for a period of two years awaiting trial. In the enquiry directed at whether substantial and compelling circumstances may be found to exist, his period in custody while awaiting trial carries little weight and becomes watered down to insignificance when consideration is given to the penalty he must sustain.

[26] For each of the remaining factors concerning the appellant's personal circumstances, there is a notable lack of detail in the evidence that would enable each fact to assume a significance, which when viewed in isolation or against the cumulative totality of the others, would impel a court to conclude that substantial and compelling circumstances are present. The appellant's personal circumstances are clearly outweighed by the gravity of the offences. A finding that his personal circumstances on their own amount to substantial and compelling circumstances would be unduly sympathetic and amount to a departure from the specified sentence, *"lightly and for flimsy reasons" (see S v Malgas supra at 477d).*

[27] Accordingly, there being no misdirection on the part of the magistrate in his approach to the question of sentence, there is no merit in the argument that substantial and compelling circumstances exist. As such, there is no basis for interfering with the sentence imposed by him.

[28] In the result :

(a) The appeal against the convictions on counts 1, 2 and 3 is dismissed;

(b) The appeal against the sentence on count 1 is dismissed; and

(c) The sentence on count 2 and count 3 is confirmed.

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S RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

I agree.

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M J LOWE

JUDGE OF THE HIGH COURT

Appearances:

For Appellant : Adv H Charles instructed Grahamstown Justice Centre

For Respondent : Adv D Els instructed National Director of Public Prosecutions, Grahamstown