Not Reportable

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

CASE NO: CA&R 18/2016

Date Heard: 02/11/2016

Date Delivered: 8/11/16

In the matter between:

KLAAS HAARHOF **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NAIDU AJ:-

[1] The appellant was convicted by the Regional Court Hankey of one count of rape, in terms of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No 32 of 2007). Section 51(1) of the Criminal Law Amendment Act, 1997(Act No 105 of 1997) was applied in the circumstances due to the fact that the complainant was raped more than once. She was also assaulted. The

appellant was sentenced to life imprisonment. This appeal lies against both the conviction and the sentence imposed.

AD CONVICTION:

[2] The grounds of appeal against sentence are set out as follows in the Notice of Appeal:

> *''1. The Honourable Court erred in finding that the State had proved its case beyond reasonable doubt;*
>
> *2. The Honourable Court erred in accepting the evidence of the complainant in the identification of the accused as the perpetrator in this matter, considering the complainant's state of inebriation at the time of the incident;*
>
> *3. The Court should have found the state witness, Pieter Michaels was a poor witness that contradicted himself and the complainant as to how the complainant came to be at the house;*
>
> *4. The Honourable Court erred in rejecting the accused's version as not being reasonably possibly true."*

[3] I deal with the second submission firstly. The appellant submits in essence that due to his state of inebriation at the time of the incident, her identification of the appellant as the perpetrator of the offence should not have been accepted by the trial court.

[4] The trial court duly considered that the complainant was inebriated at the time but viewed her evidence objectively, having regard to the evidence in its entirety. The trial court correctly, in my view, considered the fact that it was trite that the complainant and the appellant knew each other for many years prior to the incident and that there was no history of animosity between them. The complainant further testified that she was not angry with the appellant. I am cognizant of the fact that there is no duty on the appellant to advance any reasons why the complainant and Pieter Michaels would falsely implicate him. However having regard to the close relationships between the personae, I can find no reason as to why the complainant and Pieter Michaels would falsely implicate the appellant.

[5] The complainant further shortly after the attack on her and despite her injuries and the obvious pain endured as a result of the assault, advised one Pieter Van Rhyner the first person on the scene, and a little later to the first police officer on the scene one Johannes Ferreira, as to who the perpetrators of the offence were and specifically named Pieter Michaels and the appellant. It is common cause that Pieter is Pieter Michaels, the appellant's erstwhile co-accused who pleaded guilty to the offence of assaulting and raping the complainant and is subsequently serving a sentence of life imprisonment for the offence.

[6] Of further importance is the complainant's recollection of the assault on her. The complainant's evidence was clear and unambiguous in confirming that the appellant was the first to assault and rape her and that he assaulted her once with a crowbar on her chest. The complainant could have inflated her evidence by assimilating further blame on the appellant as to the assaults on her with the crowbar. She did not. Her evidence is further fortified by the evidence of Pieter Michaels in all material aspects.

[7] Cognizance must be had to the appellant's defence of a bare denial to the charges against him.

[8] The trial court correctly in my view held that to consider the appellant's version as being reasonably possibly true, would by necessary implication have called upon the trial court to dismiss the versions of the complainant, Pieter Michaels and Johannes Ferreira as being false. There were indeed discrepancies between certain aspects of the evidence of the complainant and Pieter Michaels, which relate to who arrived at the house of the appellant and as to how the complainant ended up in the room of the appellant. These were held to be immaterial.

[9] In dealing with discrepancies, a court has to consider the nature of the alleged discrepancy. Does it relate to facts incidental to the actual incident or do they relate directly to the incident. In my view the trial court correctly held that the nature of the discrepancies between the evidence of the complainant and that of Pieter Michaels

were incidental to the actual offence. The complainant testified that when she arrived at the appellant's house, the appellant and Pieter Michaels were cooking. Pieter Michaels testified that when he and the appellant arrived at the house, the complainant was already there. These discrepancies relate to facts incidental to the assault and rape of the complainant. Of importance is the fact that the versions of the complainant and Pieter Michaels as to the assault and rape complement each other in all material respects.

[10] In *S v Mkohle*[1] the court held that contradictions *per se* do not lead to the rejection of a witness's evidence. The court referred with approval to the dictum in *S v Oosthuizen*[2] where it was held that contradictions may simply be indicative of an error. The court in *Oosthuizen* also held and quoted with approval in *Mkohle* that '*'not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions , their number and importance and their bearing on other parts of the witness's evidence.* Consequently in my view the trial court correctly found that the contradictions in the evidence of the complainant and Michaels were not material as they only related to the issue of the time of the arrival of the complainant at the home of the appellant.

[11] I deal now with the third ground of appeal. The appellant submits that the trial court erred in accepting the evidence of Pieter Michaels, as his evidence and that of the

[1] *S v Mkohle* 1990(1) SACR 95 (A) at 98f.
[2] *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C.

complainant contradicted each other as to how and when the complainant arrived at the house of the appellant. As submitted above the discrepancies referred to relate to facts that are incidental to the offence. The evidence of the complainant and that of Pieter Michaels complemented each other in all material respects regarding the assault and rape of the complainant.

[12] Pieter Michaels confirms the complainant's version that the appellant was the first in the room to assault and rape her. He further confirms the complainant's version that he was responsible for the complainant's injuries to her ribs and to her head and further that he was the second person to assault and rape her. Pieter Michaels further confirms that he had peeped into the room and saw the appellant on top of the complainant, and that the appellant was busy having intercourse with the complainant. He then returned to the fore room. He later then requested the appellant's permission to have sexual intercourse with the complainant, to which the appellant provided such consented.

[13] It is common cause that Pieter Michaels then assaulted and raped the complainant. His narrative as to the assault and rape coincides with the version of events as set out by the complainant in all material respects.

[14] The appellant and Pieter Michaels knew each other for many years. There were no issues between the appellant and Mr Michaels. I accordingly find that the trial court

did not err in accepting the evidence of Pieter Michaels and that of the complainant Mieta Prins.

[15] The appellant's defence is merely that of a bare denial. He denies being the perpetrator of the offence as charged. It follows that if the evidence of the state witnesses are accepted, and having regard to the probabilities, then his version must be rejected as it cannot be held to be reasonably possibly true.

[16] Regarding sentence, the appellant submits that the trial court erred in applying the minimum sentence herein in that:

> *''6.1There was no evidence presented that the perpetrators decided to act together as a group;*
>
> *6.2 The accused raped the complainant first and thereafter left the premises unaware of the second perpetrator's actions thereafter;*
>
> *6.3 The Honourable Court erred in placing too much weight on the utterances of the accused that the second perpetrator can have his turn before he left the premises.''*

[17] It is further submitted on behalf of the appellant in the alternative that the trial court erred in not finding substantial and compelling circumstances to exist thereby enabling it to impose a lesser sentence other than that of life imprisonment.

[18] I deal with point 1 above. Section 51(1) of Act 105 of 1997 reads as follows:

''51(1) 'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.''[3]

[19] Part I of Schedule 2 reads as follows:

''Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) When committed –

(i) In circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;''

[20] Applying the law to the facts it is clear that the complainant was raped twice, by the appellant and then by Pieter Michaels. As correctly held by the trial court, the assault and rape of the complainant was one continuous event. The appellant had clearly taken advantage of an inebriated complainant and made her further compliant by assaulting her with a crowbar. Very shortly after this assault and rape, Pieter Michaels requested permission from the appellant to have intercourse with the complainant, which the appellant agreed to. The second assault and rape on the complainant was then perpetrated by Pieter Michaels on an already injured and violated complainant.

[3] Criminal Law Amendment Act 105 of 1997

[21] The assault and rape of the complainant had been initiated by the appellant. Pieter Michaels then seized upon the already injured and violated complainant and subjected her to further assault and rape. He seized upon a helpless complainant that had already been rendered such by the direct actions of the appellant.

[22] Regarding points 6.2 and 6.3 above, having rejected the appellant's defence, it is clear that these points have no merits and accordingly fall to be rejected.

[23] In *S v Malgas* 2001 (1) SACR 469 (SCA) the court dealt with the approach to sentence by an appeal court, at paragraph [12] as follows:

''A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were the court of first instance and the sentence imposed by the trial court has no relevance. As it said, an appellate Court is at large.

However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when

the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as ''shocking'', ''startling'' or ''disturbingly inappropriate''. It must be emphasized that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.''

[24] Having regard to the above, I find that the trial court correctly applied the minimum sentence herein, and correctly sentenced the appellant to life imprisonment.

[25] The appellant submits in the alternative that the trial court erred in not finding there to be substantial and compelling circumstances in his favour that warrant a departure from applying the minimum sentence.

[26] In *S v Malgas*[4] the court set the operational construction in determining the issue of ''substantial and compelling circumstances'' with respect to sentencing as follows:

[4] S v Malgas 2001(2) SA 1222 (SCA)

''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 particularly described 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, standardized 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 standardized 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 the 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 bench mark which the Legislature has provided."

[27] The appellant has numerous previous convictions dating back to 1978 up and until the offence in question. The variety of offences range from theft, stock theft and various counts of house breaking. The trial court duly considered his personal circumstances. In mitigation of sentence counsel for the appellant submitted that the

appellant was for all intents and purposes a ''first offender'' regarding the offence where violence was used. It was further submitted that the offence was not planned and as such these should be considered substantial and compelling reasons to deviate from the minimum sentence. These factors clearly are insufficient and cannot amount to substantial and compelling reasons.

[28] The actions of the appellant were particularly heinous. He took advantage of a clearly inebriated complainant and made her compliant to his vicious actions by assaulting her with a crowbar. After having finished with her, knowing full well that she had been left traumatized and helpless by his actions, gave permission to his co-accused Pieter Michaels to also violate her.

[29] The trial court in my view correctly found there to be no substantial and compelling grounds to deviate from the minimum sentence applicable in the circumstances.

[30] In the light of the above, I make the following order:

(a) The appeal against both conviction and sentence is dismissed.

V NAIDU
ACTING JUDGE OF THE HIGH COURT

BLOEM J: I AGREE.

G H BLOEM
JUDGE OF THE HIGH COURT

Appearance for the Appellant:	**Ms NM Mazibukwana**
Instructed by:	**Grahamstown Justice Centre**
Appearance for the Respondent:	**Adv D Els**
Instructed by:	**Director of Public Prosecutions Grahamstown**
Date Heard:	**2 November 2016**
Date Delivered:	**8 November 2016**