IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No.: A251/2017

In the appeal between:-

K. P. P. Appellant

and

THE STATE Respondent

CORAM: MOLEMELA, JP *et* LEFENYA, AJ

HEARD ON: 16 OCTOBER 2017

JUDGMENT BY: MOLEMELA, JP

DELIVERED ON: 6 DECEMBER 2017

[1] The appellant stood trial in the Regional Court, Bloemfontein (trial court) on a charge of rape. On the 29th of March 2017 he was convicted as charged and a sentence of 10 years imprisonment[1] was subsequently imposed on him. He applied to the trial court for leave to appeal against both his conviction and sentence but was unsuccessful. Aggrieved by that decision, he approached this Court on petition and was granted leave to appeal against both conviction and sentence.

[2] This appeal raises the following issues: whether the cautionary rule applicable in respect of the evidence of a single witness was applied by the trial court in respect of the complainant's evidence; whether the State proved its case beyond reasonable doubt; whether the trial court misdirected itself by finding that there are no substantial and compelling circumstances warranting deviation from the applicable minimum sentence; and whether the sentence imposed by the trial court is shocking or disturbingly inappropriate.

[3] The facts that led to the appellant's prosecution were presented by two witnesses, namely the complainant, who was the appellant's lover, and the police officer, who happened to be the first person to whom the complainant reported the incident, namely Constable Phekonyane. The complainant testified that she and the appellant were in a love relationship which started in the year 2008. In the same year, she and the appellant started cohabiting at her house and a child was soon conceived. The relationship was good in the first few months but deteriorated when the complainant was forced to leave her employment as a result of her pregnancy. Having been left without a source of income, she had to ask the appellant to avail the income he derived from selling cigarettes. The appellant did not take kindly to such requests and became aggressive. Soon after their child was born, she decided to find another place to live in.

[4] Although the relationship between the complainant and the appellant was never formally terminated, there were stages during which the two of them had no contact with each other, the longest of which was a period of three years. They resumed their

---

[1] This is the applicable minimum sentence in terms of the provisions of Part III of Schedule 2 (of section 51) of the Criminal Law Amendment Act 105 of 1997.

cohabitation in 2011. It appears from the complainant's evidence that they stayed at the appellant's place of residence in Dinaweng for the better part of their cohabitation. Theirs was a stormy relationship characterized by insults, threats of assault and actual assault even in the presence of children. On one occasion the appellant spat on the complainant's face after telling her that she was stinking because she had been out with other men. She once broke up with him and returned to her house but he would show up unannounced at night and insist on being allowed into her house. This was what discouraged her from seeking a protection order against him. Although she had contemplated leaving him on several occasions, she did not do so because she was worried that relocating would mean that she would lose her job and would not be able to maintain her children.

[5] On Friday 15 April 2016 the complainant was allowed to leave her workplace earlier than usual because she was not feeling well. She decided to go to her own house in Motshabi so as to make arrangements for someone who was looking for a place to stay. Upon her arrival at the appellant's home at about 19h00 the appellant demanded to know where she was coming from. A quarrel ensued, whereafter the appellant instructed the complainant to return to her house in Motshabi. She told him that she could not do so because she was not feeling well.

[6] At around 23h00 the appellant again instructed the complainant to go to her own house in Motshabi location. He threatened to assault her by hitting her with stones if she did not do so. Due to the threats, she took the small box containing her clothes and left with the appellant. As she was worried about her safety, she suggested that they walk in the vicinity of the shacks but the appellant was against that idea and insisted that they walk in the open veld. Along the way they came across a dam filled with sewerage water. The appellant instructed her to eat faeces from the sewerage dam. She refused. The appellant picked up some stones and threatened to stone her. She screamed for help but he smugly pointed out that no one would hear her screams as he had deliberately chosen a route that was far away from the shacks. He then instructed her to lie down on the grass so that he could have sexual intercourse with her. She submitted to him out of fear. He penetrated her vagina without her consent and

thereafter instructed her to perform oral sex on him. Induced by her fear of being harmed, she obliged. When the appellant had had his way with her, he told her that they would no longer going to her place of residence in Motshabi residence but to his. They left the scene and returned to his house. They arrived at his house at 01h30. She pleaded with him to allow her to sleep so that she could have some rest, as she needed to go to work the next day.

[7] As she was deeply hurt by the incident, she decided to go and report the matter to the police in the morning. She duly went to the police station and laid rape charges against the appellant. She was taken for a medical examination, after which she was dropped off at her house. She decided to fetch her belongings from the appellant's house, but discovered that the appellant had immersed her clothes in water. She decided to wait for her clothes to dry and spend the night at the appellant's house. She left for her house the next day under the pretext that she was concerned that her house would be vandalized as nobody was staying there. The appellant decided to accompany her. The appellant stayed with her at her house until he was arrested by the police on 5 May 2016. She was cross-examined extensively regarding why she continued to stay with the appellant after the incident. She stated that she was afraid of the appellant as he had the habit of showing up at her house uninvited and would insult her if she did not let him in. She however continued living with him in the knowledge that he did not suspect that anything was amiss as she had not told him that she had laid charges against him. According to the complainant, the relationship between her and the appellant ended on the date of the appellant's arrest on 5 May 2016. She later quit her job after the appellant had laid false charges of murder against her in revenge for the charges she had laid against him. As she could not be linked to that offence in any way, no prosecution was instituted against her.

[8] Constable Phekonyane, a member of the South African Police Services testified that on 16 April 2016 she took down the complainant's statement. The complainant informed her that she was raped by her boyfriend in the open veld on 15 April 2016. When the complainant was narrating the incident, she was very emotional. According to the police officer, it seemed to her that the complainant was afraid of the appellant. It

transpired during her cross-examination that the complainant had not informed her that she was cohabiting with the appellant.

[9] After the closure of the state case, the appellant opted to give evidence. He denied all the allegations that were made against him. He disputed that, on the date of the incident he took the complainant by force to the open veld where he raped her. He also denied having been abusive to the complainant throughout their relationship and asserted that they had a good relationship. He asserted that the complainant's account of events **was a** fabrication. According to the appellant, the complainant's motive for falsely implicating him was her discontent with the fact that he had, during March 2016, told her that a certain Kotlong had informed him that she was involved in the commission of a certain offence.

[10] The versions advanced by the State and the defence at the trial are mutually destructive. According to the complainant's evidence she was raped by the appellant in the open veld next to the dam. The appellant vehemently denied this.

[11] It was argued on behalf of the appellant that the trial court erred by not paying attention to several unsatisfactory features of the complainant's evidence. Much was made about the fact that the complainant had chosen to disclose in cross-examination for the first time that the appellant had, at the inception of the relationship in 2008, also had sexual intercourse with the complainant without her consent. It was contended that the complainant had failed to advance any valid explanation for her failure to report that incident and that cast doubt on the truthfulness of her assertion of having been raped by the appellant on 15 April 2016. The appellant's counsel considered this aspect to impact negatively on the complainant's credibility. It was further argued that similarly, the complainant's explanation for having continued to live with the appellant after the rape was flimsy, at best. That conduct, so it was argued cast doubt on her the truthfulness of her accusations.

[12] It is trite law that in criminal matters, the state bears the burden of proving the accused's guilt beyond reasonable doubt. Indeed, an accused person bears no duty

whatsoever to prove his innocence. The correct approach regarding the evaluation of evidence is trite. The bottom line is that all the evidence that was adduced at the trial must be considered in totality and the conclusion reached must account for all the evidence[2]. I have perused the record to assess whether the trial court's evaluation of the evidence is in accordance with the aforesaid authorities. In my view, the trial court's evaluation of evidence passes muster.

[13] It is correct that as far as the testimony of the complainant being raped by the appellant is concerned, the complainant is the only witness who presented direct evidence. I am satisfied that the trial court properly considered the application of the cautionary rule and referred to several authorities on this aspect. It is evident from the judgment that the trial court found the complainant's evidence to be satisfactory in all material respects[3]. It is plain that the appellant's contention that the trial court failed to apply the cautionary rule is without any merit. Insofar as the appellant's counsel contended that the complainant's failure to disclose that she and the appellant were cohabiting at the time of the incident attested to her unreliability, I beg to differ. Sight must not be lost of the fact that the complainant did disclose that they were in a love relationship. In my view, her failure to disclose that aspect is neither here nor there and has no bearing on her credibility as a witness. I am of the view that the fact that the complainant only disclosed under cross-examination that their love relationship commenced after the appellant had had non-consensual sexual intercourse with her, viewed in its proper context, should not serve to discredit her as she was merely being honest about the genesis of their relationship.

[14] Furthermore, it is clear from the trial court's judgment that it was alive to the fact that it was confronted with mutually destructive versions, as it referred to and analysed the two versions in line with the applicable authorities. At the end of the day, the paramount consideration is whether the evidence establishes the guilt of the accused person beyond reasonable doubt. The trial court considered the probabilities in respect of both the appellant and the complainant's versions. It took into account that the

---

2 *S v van der Meyden* 1999 (1) SACR 447 (WLD) at 449 H; *Mclaughlin v The State* [2013] ZASCA 9 at para 30.
3 *S v Mokoena* 1956 (3) SA 81 (A) at 85 F-H.

complainant was distressed and crying when she was reporting the matter to Constable Phekonyane. That emotional state is also confirmed in the medical report that was submitted as an exhibit in the proceedings. The trial court correctly considered this aspect as refuting any possibility of the allegations having been fabricated. Significantly, when the complainant was later taken to point out the scene of the crime, the layout of the scene corresponded with the detailed description that she had provided to the police when her statement was taken earlier that day. This is evident from the photographs of the scene, which were handed up as exhibits. The following passage of the trial court's judgment attests to the cautious approach it followed in the evaluation of the evidence:-

> "The complainant thus made a very favourable impression on the court apart from the fact that she has testified in court she has reported the matter almost immediately as well. Interestingly enough she has related the version almost immediately on that specific day to Constable Phekonyana as well as to sister Seko, a forensic nurse. Both these reports were made the Saturday morning after the night of the alleged rape. Looking at the entire version, and I am also looking at possible motives. the moment when you are dealing with a matter between people who are staying together or who are living as husband and wife it is always a danger that there might be an ulterior motive for the complainant to get rid of a person."

[15] It has been stated in a plethora of cases that courts of appeal will not lightly tamper with the credibility findings made by the trial court. I find no justification for tampering with its credibility findings. In S *v Francis*[4] the court remarked as follows:

> · This court's power to interfere on appeal with the findings of the trial court are limited ... bearing in mind the advantage which a trial court has seeing, hearing and appraising a witness, it is only in exceptional circumstances that this court will be entitled to interfere with the trial court's evaluation of oral testimony."

4 1991 (1) SACR 198 (A) at p204.

In S *v Shackell*[5] the court stated the following:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt & that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is fine. If the accused's version is reasonably possible true in substance, the court must decide the matter on the acceptance of the version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true".

The trial court's approach in its evaluation of evidence cannot be faulted in any way.

[16] I am mindful of the fact that the acceptance of the prosecution's evidence cannot, by itself alone, be a sufficient basis for rejecting the version of the appellant. In order to convict, there must be no reasonable doubt that the evidence implicating the appellant is true, which can only be so if there is at the same time no reasonable possibility that

5 2001(4) SA 1 (SCA) at par 30.

the evidence exculpating him is not true[6]. This dictum was cited with approval by the

[6] *S v Sithole and Others* 1999 (1) SACR 585 (W).

Supreme Court of Appeal in *S v Musiker*[7]. For the reasons set out hereunder, I am of the view that the evidence in this matter meets the standards set in the aforesaid authorities and therefore justified the trial court's conviction. It is undisputed that the appellant and the complainant have been in a relationship for a long time. It is unlikely that the complainant can, out of the blue, present such a detailed account of events falsely accusing the father of her own child, with whom she still had a relationship and co-habited, of a serious charge of rape. The alleged motive for false charges put forward by the appellant was correctly rejected by the trial court. It is highly unlikely that the complainant would choose to lay false charges against the appellant simply because one Kotlong had passed on some information to him about her alleged involvement in crime. She stood to gain nothing from doing so. If anything, the likelihood is that false charges would have been laid against Kotlong since he was the

[7] 2013 (1) SACR 517 at para 14.

source of the incriminatory information. In any event, it is highly unlikely that if the complainant considered the appellant's knowledge about her alleged nefarious deeds to be a threat, she would have chosen to wait for almost one month before laying such false charges against the appellant.

[17] It bears mentioning that the evidence showed that after the complainant had laid charges against the appellant, the police officer took her back to her house despite the fact that her own observation was that the complainant was afraid of the appellant. There seems to have been no effort to arrest the appellant on that day. Eventually, the appellant was only arrested on 5 May 2016, about three weeks after the incident. Given the complainant's evidence that the appellant had the habit of going to her house uninvited and the history of the abuse, it is unlikely that the mere fact that charges had been laid against the appellant would render the complainant less fearful of the appellant. The criticism directed to the complainant for continuing to live with the appellant after laying charges against the appellant simply fails to take that aspect into account. It also fails to consider that the complainant said that although she was afraid of the appellant, she continued living with him because she knew that he was not aware that she had laid charges against him. I understand her to mean that under those circumstances, she considered him to be no bigger threat to her than what had previously been the case. In considering this aspect, the following remarks made by the Constitutional Court in S *v Baloyi and Others*[8] are apposite:

> "All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular. on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it *is so often concealed* and so frequently goes unpunished." My emphasis.

[18] Having considered all the circumstances of the case, I am satisfied that the conviction was justified. I now turn to consider the appeal against the sentence imposed. It is trite law that sentencing is pre-eminently a matter for the trial court. In *S v Malgas,* the court remarked as follows:-

---

8 2000 (2) SA 425 (CC) at para

> "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 a court of first instance and the sentence imposed by the trial court has no relevance. As it is 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 emphasised 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."

[19] The mitigating factors placed on record on behalf of the appellant are as follows. He was 36 years old at the time of commission of the offence and had no related previous conviction. He is the father to four children. The mother of his three children has passed away and the children were being taken care of by the appellant's family in Lesotho. The appellant attended school only up to grade 3 and left school due to financial constraints. The appellant made a living through odd jobs and used his income to support himself and his minor children. All these mitigating factors were taken into account by the trial court.

[20] The seriousness of rape and domestic violence in general and the prevalence thereof are serious aggravating factors. It cannot be gainsaid that rape is an abhorrent crime. In *S v De Beer*[9] the court aptly stated as follows:

---

9 (unreported SCA judgment) Case No 121/04, 12 November 2004) at para 18.

> "Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself."

[21] A person's home is normally expected to be a place of refuge. Unfortunately, due to the scourge of domestic violence, many homes are places where women live in fear, resulting in stress, anxiety and reduced quality of life. In many instances, victims of domestic violence are unable to leave their unfortunate circumstances due to a variety of reasons, including the economic hardship that they may suffer as a consequence of that. In this instance, the complainant regarded relocation as the only solution to her problem due to the abuse she had suffered at the hands of the appellant for years. She however endured it all because she did not want to risk losing her job. The victim impact report revealed that the complainant was still under severe emotional stress as a result of the incident. The appellant did not show any remorse for his actions.

[22] In my view, the aggravating factors far outweigh the mitigating factors. Courts are obliged to impose the prescribed minimum sentences and are enjoined to refrain from departing from them for flimsy reasons[10] The scourge of gender-based violence has been bemoaned in many court decisions. This scourge is simply not abating. In a society in which male power and the abuse thereof are threatening to make a mockery of all prescripts directed at curbing gender-based violence, courts must consistently impose sentences that reflect that proper consideration has been paid to the nature of this offence[11]. In my view, there are no substantial and compelling circumstances that warrant deviation from the applicable minimum sentence of 10 years imprisonment.

[23] Given the serious aggravation in this case in that the appellant forced the ailing complainant to leave the safety of her abode in the middle of the night and was ordered

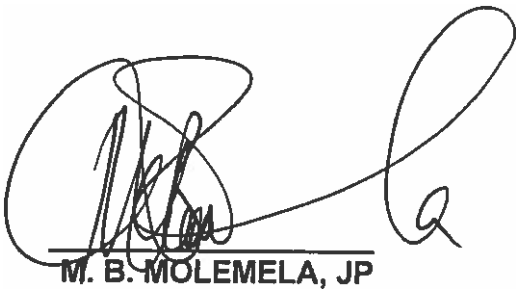
---

[10] *S v Malgas* (supra); *S v Matyityi* 2011 (1) SACR 40 (SCA) at 53.
[11] *S v* Swartz *and Another* 1999 (2) SACR 380 (WC) at 387.

to eat human excrement at a sewerage dam in the veld before being forced to engage in vaginal and oral sex with the appellant, I am of the view that the sentence imposed is not disproportionate[12] in relation to the triad of sentence despite the fact that the appellant spent 10 months in custody[13] awaiting finalization of the trial. It is a pity that the appellant's incarceration will mean that he will not be able to provide emotional and support to his children for a considerable time. Even though courts are expected to ensure that the form of punishment imposed is the one that is least damaging to the interests of the children, the circumstances of this case are such that the appellant should not be allowed to escape the consequences of his dastardly deeds for which he has not shown any remorse. I am satisfied that in dealing with the appellant's sentence, the trial court took into consideration all the relevant factors and balanced them all one against the other as required and imposed a sentence that was appropriate in the circumstances. In the absence of any misdirections committed by the trial court in its application of the legal principles germane to sentencing, there is no reason to tamper with the sentence imposed by it.

[24] In the result the following order is made:

1. The appeal fails *in toto*.
2. The conviction and sentence imposed by the trial court are confirmed.



M. B. MOLEMELA, JP

[12] *S v Malgas* (supra) at para 22.

[13] *Msimanga v The State* (2017) ZASCA 180 (1 December 2017).

I concur.

[redacted]

On behalf of appellant:

Adv S.S. Kambi
Instructed by
Legal Aid South Africa
BLOEMFONTEIN

On behalf of respondent:

Adv K.E. Lesie-Shale
Instructed by
Director Public Prosecutions
BLOEMFONTEIN