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 Number: A34/2019

In the matter between:

TSHEPO HLAPANE Appellant

and

THE STATE Respondent

CORAM: MATHEBULA, J *et* MOROBANE, AJ

JUDGMENT: MOROBANE, AJ

HEARD ON: 15 APRIL 2019

DELIVERED ON: 04 JULY 2019

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[1] This is an appeal in terms of section 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 ("the CPA"). The appellant was convicted in the Regional Court on a charge of rape. He was sentenced to life imprisonment. The appeal is against the conviction and the sentence.

[2] The appellant relied upon several grounds of appeal and alleged that the Court *a quo* erred in its findings, in that: the complainant was an honest and reliable witness and that her testimony was corroborated by other witnesses; he was not a credible witness due to the inconsistencies in his testimony; the State has proved his guilt beyond a reasonable doubt; the facts in mitigation constitute substantial and compelling circumstances; and the court over-emphasised the seriousness of the offence and that he was a threat to the society.

[3] The facts are briefly as follows. The complainant met the appellant at a concertina festival held at the third house from her home. She rejected the appellant's love proposal. The appellant approached her for the second time when she was on her way home. It was between 4h00 to 5h00 in the morning. He pushed her to the vehicle which was parked next to the gate. She resisted and screamed. The appellant threatened to shoot her if she screamed again. He covered her with a blanket and throttled her with his hands. He assaulted her with a stick when she tried to fight back.

[4] She was taken next to the tarred road against her will. They wrestled until he was on top of her and she was lying on her back. He undressed her by removing one leg of her tight jeans (pants) and her panty. The appellant penetrated her vagina with his penis and had sexual intercourse without her consent. After he was done with her, he went looking for his blanket on the other side of the fence. At that moment, she managed to wear her panty, grabbed her jeans on her hand and ran to her aunt's house.

[5] Her cousin Sefora testified that she observed that the complainant's head and feet were covered in mud. She had visible injuries on her body. The complainant was only wearing a vest and panty. She was holding her pants in her hand with no shoes on. She informed her that she was raped.

[6] Dr Scholtz examined the complainant and completed the J88 report. He observed several bruises on her upper body and legs. The doctor concluded that the complainant's injuries were consistent with the assault. The gynaecological examination was recorded as normal. The report was handed in per agreement and admitted as Exhibit 'A'.

[7] It is trite law that the findings of facts by the trial court are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[1] The appeal court will not lightly interfere with the findings of the trial court unless it has misdirected itself or has committed an irregularity. In any event, the court of appeal has a duty to investigate the factual findings made by the court *a quo* in order to ascertain whether they are correct or not. In the event that wrong findings have been made then interference is justified.[2]

[8] In ***S v Chabalala***,[3] the proper approach in evaluating evidence was considered and the court held that:

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1 *S v Hadebe and others* v 1997 (2) SACR 641 (SCA) at 645E-F
2 *S v M* 2006 (1) SACR 135 (SCA) at para 152A-C
3 *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139I-140A

> 'The correct approach is to weigh up all elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[9] The complainant was a single witness and her evidence was dealt with in terms of section 208 of the CPA. It provides that an accused may be convicted of any offence on the single evidence of any competent witness. A person can be convicted on the evidence of a single witness if such evidence is clear and satisfactory in every material respects.[4] Having considered the factual findings by the court *a quo*, I am satisfied that the court has properly dealt with the evidence presented.

[10] The court *a quo* found that the complainant's testimony was corroborated by other independent pieces of evidence of the witnesses. That is, the clothing she was wearing when she arrived at her aunt's house, the absence of the complainant's boyfriend at the festival, the bite marks on her back, the appellant's confirmation that he indeed had sexual intercourse with her and the medical report regarding the injuries sustained by the complainant. It also found that her evidence was supported by probabilities. In its evaluation of the evidence, the court *a quo* was correct and cannot be faulted. I am satisfied that the respondent has proved its case beyond a reasonable doubt.

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4 *R v Mokoena* 1932 OPD 79 at 80

[11] The appellant testified that he was at the concertina festival together with his girlfriend, the complainant. She wanted to sleep and he accompanied her to the vehicle. He had sexual intercourse with her in the vehicle, with her consent. After he was finished, he left her sleeping in the vehicle. He went back to the festival and continued to consume liquor. At about 5h00 in the morning, the complainant came to fetch him and he accompanied her home. Her boyfriend approached them. He (boyfriend) attempted to assault him with a stick, but he warded him off by pelting him with stones. The boyfriend turned to the complainant and assaulted her with a stick.

[12] The version of the appellant was denied by the complainant and the other witnesses. It was also rejected by the court *a quo* on the basis that it was riddled with lies and was not reasonably possibly true. The court found the appellant was not a credible witness. In light thereof, the appeal on this ground must fail.

[13] The next aspect to be considered in this appeal relates to sentence. Ordinarily, sentencing is within the discretion of the trial court. In ***S v Bogaards***[5] the court said the court of appeal will only interfere with sentence where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is disproportionate or shocking. The appellant had committed an offence for which a minimum sentence of life imprisonment is prescribed. The court can only deviate from

[5] *S v Bogaards* 2013 (1) SACR 1 (CC) at 14C-E

imposing the prescribed sentence if there are substantial and compelling circumstances.

[14] The court *a quo* considered the appellant's mitigating circumstances during sentencing. It has taken into account that the appellant is a first offender; is 26 years; is a musician although his income could not be ascertained; has 12 cattle; left school at grade 2; and has been in custody for a year. The court *a quo* could not find them to be substantial and compelling so as to justify a deviation from the prescribed minimum sentence. The victim, an 18 year old girl was violently raped by the appellant. She was violated in the worst possible manner. Under these circumstances, the society expects that rapists should not only be punished, but also that the scourge of rape be eradicated.

[15] In ***S v Malgas***[6] Marais, J remarked 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 the 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.'

[16] In ***DPP North Gauteng, Pretoria v Thusi***[7] it was held that youthfulness, or the prospects of rehabilitation could not tip the

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6 *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12

7 Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and others 2012 (1) SACR 423 (SCA) at 429H-I

balance in the respondent's favour when it was weighed against the objective gravity of the offences, its prevalence and the legitimate expectation of the society that such crimes had to be seriously punished. I could find no misdirection from the court *a quo* in exercising its discretion. In the light of the appellant being convicted of rape, the trial court correctly applied the prescribed minimum sentence.

[17] Accordingly I propose the following order:-

1. The appeal against conviction and sentence is dismissed.

V.M. MOROBANE, AJ

I concur, and it is so ordered.

M.A. MATHEBULA, J

On behalf of the appellant: Mr L Tshabalala
Instructed by:
Bloemfontein Justice Centre
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On behalf of the respondent: Adv MMM Moroka
Instructed by:
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