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: A40/2021

In the Appeal between:

XHITHA STEPHEN NGOYELO Appellant

and

THE STATE Respondent

CORAM: MOLITSOANE, J *et* DANISO, J

HEARD ON: 26 JULY 2021

JUDGMENT BY: DANISO, J

DELIVERED ON: 26 OCTOBER 2021

---

[1] The appellant was arraigned in the Regional Court, Hertzogville on three counts, namely: assault with intent to cause grievous bodily,

sexual assault and rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("*The CLAA*").

[2] The convictions pertain to the incidents which occurred on 07 and 08 March 2015. The charge sheet alleged that the appellant had grievously and sexually assaulted the complainant and also raped her more than once for the duration of the evening of the 07th March 2015 until the next morning.

[3] The appellant denied having raped the complainant and pleaded consent. He was subsequently sentenced to 2 years' imprisonment for assault with intent to cause grievous bodily harm, 5 years' imprisonment for sexual assault and life imprisonment for rape. The sentences were ordered to run concurrently.

[4] The appellant is aggrieved by the conviction and sentence. This appeal is by virtue of the appellant's right to automatic appeal as provided for in section 309 (1)(a) of the Criminal Procedure Act, 51 of 1977 ("the Act").

[5] The facts of this matter and the evidence led at the trial court are comprehensively illustrated in the judgment of the trial court I deem it unnecessary to rehash them here except to refer to the relevant parts thereof for the purpose of this judgment.

[6] From the evidence proffered in the trial court it was common cause that during September or October 2014 the appellant and

complainant became involved in a love relationship after meeting at a tavern known as Coca Cola tavern in Hertzogville. The complainant was visiting her aunt in Hertzogville. When she returned home in Kokstad they maintained contact telephonically until December 2014.

[7] The appellant and the complainant reunited on the evening of 07th of March 2015 at the same tavern. After speaking to each other they left the tavern together and later had sexual intercourse.

[8] The circumstances under which the complainant and the appellant had sexual intercourse were in dispute. According to the complainant, the appellant lured her away from the tavern on the pretext that she was accompanying him halfway up to a certain corner and would return to the tavern. When they reached the agreed spot the appellant who had been affectionate became aggressive. He slapped her, pushed her with a stone which he was holding in his hand, threatened to invite some boys they met along the road to join him and gang rape her if she dared to scream.

[9] He ordered her to walk with him to a disused municipal building where he undressed her. He raped her more than once and also made her to suck his penis while he licked her vagina. He then took her to some sewerage plant and raped her again, when she tried to run away he chased her, caught up with her and dragged her by the neck threatening to kill her. He raped her again. The she told him that she needed to relieve herself and he ordered her to squat on the ground. He collected her urine with his hand and drank it.

[10] The appellant then forced her to walk to his backroom at the farm where he was employed when he again raped her and thereafter ordered her to sleep. Her ordeal only came to an end the next morning. Shortly after 7am, after raping the complainant he ordered her to cook, eat and bath thereafter he let her go to her aunt's place while he went to the bank to withdraw R1000.00 that he had promised to give to the complaint. He had asked the complainant to collect the money instead she reported the rape incident to her aunt and her cousin Ms Dolly Elisa Nthoano (incorrectly referred to as Doreen in the judgment) when she arrived home.

[11] Dolly corroborated the complainant's first report of the rape incident. She also confirmed that the complaint was at the tavern with her and some friends. She left their company to meet the appellant outside the tavern. Dolly was not even aware that the complainant had left the tavern until the appellant's wife approached her saying the complainant left with her husband. She looked for the complainant and even called her on her cell phone to no avail. She ultimately left the tavern and went home. The complainant arrived in the morning while Dolly was with her mother, she was crying and spontaneously reported that she was raped. Dolly accompanied her to the police station to report the matter, thereafter she was taken for a medical examination.

[12] A medical report compiled by a nursing sister on 09 March 2015 was handed in by concurrence of the State and the defence as Exhibit "A". It indicated the presence of a fresh bruise on the back of the left shoulder and no injuries on the genitalia.

[13] The complainant's aunt did not testify as she was deceased at the time of the trial.

[14] The appellant challenges his conviction and sentence on the grounds that: in determining whether the State had proved the appellant's guilt beyond a reasonable doubt the trial court accepted the uncorroborated evidence of the State witnesses with its all material contradictions and improbabilities whereas the contradictions and improbabilities existing in the evidence tendered by the defence were used as the basis for rejecting the defence's version as false beyond a reasonable doubt.

[15] The appellant submits that the sentence of life imprisonment is strikingly inappropriate having regard to the appellant's personal circumstances, remorse shown and the absence of emotional and serious physical injuries sustained by the complainant. The sentence should be reduced to 15 years' imprisonment.

[16] It is trite law that a court of appeal will not interfere with or tamper with the trial court's judgment or decision regarding either conviction or sentence unless it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law. See *R v Dhlumayo & Another* **1948 (2) SA 677** (A). The principle was also restated in *S v Mlumbi* **1991 (1) SACR 235** (SCA) at 247g, as follows:

(a) "*Dit is gevestigde reg dat indien daar geen wanvoorligting op die feite is nie, die vermoede bestaan dat die verhoorhof se evaluering van die getuienis korrek is, en dat 'n Hof van appel*

alleenlik daarmee sal inmeng indien dit oortuig is dat daardie evaluasie verkeerd is".

[17] The complainant was a single witness implicating the appellant in the crimes.

[18] In its judgment, the trial court meticulously evaluated the complainant's evidence, duly considered its merits and demerits and having weighed it against the appellant's bare denial and the inconsistencies in his evidence it determined that despite the minor imperfections in the complainant's evidence, her version that the sexual intercourse was not consensual was cogent and corroborated by the evidence of her first report of the rape to Dolly and also by the J88 with regard to the injury she sustained on her back.

[19] From the record of the proceedings it is clear that there were no material contradictions in the evidence of the complainant and between the complainant's evidence and her witness, Dolly.

[20] In terms of section 208 of the Act an accused may be convicted of any offence on the evidence of any competent single witness. The court need only find that the evidence was trustworthy and that the truth has been told in that case, corroboration is not even necessary. See *S v Sauls and Others* **1981 (3) SACR 172** (A) at 173 and S v Mahlangu **2011 (2) SACR 164** (SCA) at 171 B.

[21] On the other hand, the appellant's version that the charges against him were fabricated by the complainant who had an axe to grind with him for marrying another woman instead of her and also for not giving her the R1000.00 he had offered her was gainsaid by his own evidence that at all material times hereto they were on good terms he even proposed marriage to her but she refused. The complainant had also refused to take the money that he had offered her.

[22] As correctly pointed out by the trial court it was improbable that a woman who was so in love and yearned for this person to marry her would turn around and lay charges against the very same person that she loved and who had also left his wife to be with her. The fact that the complainant had reported the rape immediately after she had parted ways with the appellant militated against his claim of false implication as there was no enough time for the complainant to contemplate the purported false charges.

[23] The appellant countered the complainant's account of the rape incidents with new evidence. He testified that it was actually the complainant who had initiated the sexual encounter. She is the one who had suggested that they leave the tavern and find a place to have intercourse. He took the complainant to his backroom at his work place to avoid being detected by his wife.

[24] On their way they came across two boys who asked him for matches but it was the complainant who responded telling them that the appellant was not a smoker. Although they went to the municipal building and the sewerage plant they were merely

walking past nothing happened there. They had intercourse at his backroom which was initiated by the complainant.

[25] The complainant asked him for a cell phone charger. He left the room to borrow it from the neighbours when he returned he found her stark naked in his bed. The complainant was so eager for sex that she complained when he joined her in bed still wearing his underwear. After intercourse, she complained about his sexual performance stating that it was always not up to standard when he had imbibed liquor, furthermore, it was the appellant's testimony that it was not the first time that they slept together.

[26] It was his testimony that the complainant used to visit him on weekends at his brother's residence where they would engage in sexual intercourse and also visit the tavern where he would buy alcohol for the complainant. Dolly and his witness, Ms Moipone Leeuw were aware of these weekend visits. With regard to the injury, he told the court that the complainant had told him that she sustained the injury at work.

[27] Ms Leeuw is the appellant's sister in law. She confirmed the appellant's version that before the incident the complainant used to visit the appellant at her residence where she (Ms Leeuw) would reprimand the complainant for her fornication with the appellant.

[28] All these allegations were not put to the State's witnesses during cross-examination. It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine the witness upon the facts which he intends to prove in

contradiction, so as to give the witness an opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, that witness should be cross-examined upon the matter which it will be alleged to make his case unworthy of credit. It is highly irregular to let a witness' evidence go unchallenged in cross-examination and afterwards argue that they must be disbelieved.

[29] In the circumstances, I'm satisfied that the improbabilities and the inconsistencies in the appellant's version affected his credibility and cast doubt on his defence of consensual intercourse. The trial court was correct to reject it as false and to accept that the State's evidence proved that the appellant committed the offences he was charged with beyond a reasonable doubt.

[30] In the circumstances, I'm satisfied that the appellant was correctly convicted.

[31] As regards sentencing, it is trite that punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal must approach an appeal against sentence with due deference to the trial court and may only interfere where it is clear that the trial court misdirected itself or imposed a sentence that is disturbingly inappropriate. (*S v Kgosimore* **1999 (2) SACR 238** SCA.

[32] It is common cause that in respect of the rape count the minimum sentence of life imprisonment is in terms of section 51(1) of the CLAA applicable unless the court found substantial and compelling reasons justifying a lesser sentence.

[33] It is the appellant's case that in considering whether there were substantial and compelling circumstances warranting a deviation from the prescribed sentence the trial court ignored the appellant's personal circumstances and mitigating circumstances namely: his age of 40 years; that he was employed, married with 4 dependants; his remorse; that the complainant did not sustain any emotional trauma or serious physical injuries; that he was a first offender in relation the rape crime and overemphasized the nature of the crime, that the complainant was helpless and defenceless; the appellant's lack of remorse and his previous convictions which were older than 10 years.

[34] On the other hand, the State contends that the trial court did not commit a misdirection because it considered the nature and the circumstances under which the offences were committed, viz, that the appellant and the complainant were in a relationship but he subjected her to an inhumane and degrading treatment by assaulting her, threatening to kill her and raping her several times without being remorseful afterwards. The appellant has a propensity to commit violent offences and this can be gleaned from his list of previous convictions. His personal particulars cumulatively or individually compared to aggravating circumstances do not constitute substantial and compelling circumstances warranting a lesser sentence than the sentence prescribed by the legislature. I agree with the State's contentions.

[35] The appellant's personal circumstances are insignificant when weighed against the brutality and repulsive nature of the offences the appellant has been convicted of, specifically the rape count. It

has been said in *Vilakazi v The State* ***2009 (1) SACR 552 (SCA)*** at paragraph 58 that:

> "*In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided".*

[36] It is aggravating that the complainant was violated by her partner, a man who was supposed to care and protect her.

[37] It is equally aggravating that except for the submissions from the bar by the appellant's counsel, the appellant has neither shown nor verbalized remorse.

[38] The complainant's trauma is apparent in the record of the proceedings. She wept while testifying and also while listening to the appellant degrading her when he was on the stand. Her physical injuries are also depicted on the J88.

[39] The fact that the complainant did not sustain any serious injuries pertaining to the rape does not constitute a substantial and compelling circumstance justifying the imposition of a lesser sentence. See s 51(3) (aA) (ii) of the CLAA.

[40] Gender Based Violence has reached pandemic proportions. Crimes against women and children continue unabated, these crimes cause an outrage in the society which looks to the courts for protection and

punishment of the offenders. I cannot fault the trial court for imposing a sentence that speaks to the plight of society by removing such an offender from the community.

[41] Having regard to the facts of this matter, I'm not persuaded that the appellant's personal factors together with the factors alluded to by the appellant cumulatively as well as individually are sufficient to constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. Life imprisonment is an appropriate sentence for cases devoid of substantial and compelling circumstances. (*S v Abrahams* **2002 (1) SACR 116 SCA** para 29).

[42] In the result, I would make the following order:

1. The appeal against conviction and sentence is dismissed.

N.S DANISO, J

I concur

P.E. MOLITSOANE, J

On behalf of Appellant:	Adv. P.L. van der Merwe
Instructed by:	Legal Aid SA
	BLOEMFONTEIN

On behalf of respondent:	Adv TE Komane
Instructed by:	The Director of Public Prosecutions
	BLOEMFONTEIN