**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appeal No.: A42/2023
DPP Ref No: 10/2/5/1-(2023/029)
18 March 2024

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/ NO

05/04/24 [redacted]
DATE SIGNATURE

In the matter between:

**KGATITSWE, T** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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**JUDGMENT**

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**Karam AJ:**

**INTRODUCTION**

1. The appellant was convicted in the Roodepoort Regional Court of:

   count 1 – housebreaking with intent to rape; and

   count 2 – rape, read with the provisions of Section 51 (1) of the Criminal Law Amendment Act 105 of 1997.

2. He was sentenced as follows:

   count 1 – 5 years imprisonment; and

   count 2 – 25 years imprisonment, the learned Magistrate having found substantial and compelling circumstances to deviate from the minimum sentence of life imprisonment.

   The sentences were ordered to run concurrently, resulting in an effective sentence of 25 years imprisonment.

3. Leave to appeal was granted by the court a quo in respect of conviction and refused in respect of sentence.

**THE EVIDENCE**

4. Sannah Manuel testified. She is the complainant in the matter.

   4.1 In the early hours of 17 February 2020 at around 02h00, she was alone

asleep at her residence. She was awakened by noises. The sound appeared to be that of someone cutting steel bars. She peered out of the window but did not see anything. The noise continued. She pressed her panic button. Her security company attended at the property but did not enter same. She was advised that they did not see anything untoward. The noises continued. In short, she pressed her panic button three times that evening. She did see someone attempting to jump into her property but the person fell back outside her property. She went to sleep and subsequently heard the sound of a person falling and glass breaking. Her bedroom door did not lock and en route to another bedroom which she intended to lock herself in, she encountered an assailant who physically assaulted her and threatened to kill her and himself. She recognized the voice of the assailant as that of the appellant. As a result of the assault, she lost consciousness. Upon regaining consciousness, she discovered that her lower body was naked. She saw the appellant standing in the dressing room of her bedroom.

4.2 As she stood up, he grabbed her, threw her onto the bed and penetrated her vagina with his penis. Feeling nauseous, she pushed him off of her and ran to the bathroom where she vomited. The appellant entered the bathroom and penetrated her vagina with his penis, from behind her, as she was rinsing her mouth. He subsequently pulled her back to the bed, lay on top of her and raped her again vaginally. In the course thereof, she received a call from the security company. The appellant instructed her to answer the call. The complainant did so, advising them that all was in order.

4.3 She received a second call whilst the appellant was still on top of her. It was from

a work colleague with whom the complainant had a lift club. The complainant advised the colleague that she was not going to work as she had encountered some problems. Upon terminating the call, the appellant switched off the complainant's telephone. Shortly thereafter the colleague arrived with her children at the complainant's gate, not being able to reach the complainant telephonically. The appellant instructed the complainant to go outside and speak to the colleague. He threatened to shoot the complainant if she said anything. Dressed in her gown and wearing a head covering, which concealed her injuries, the complainant went to the gate. The colleague remarked upon the alcohol bottles lying at the gate.

Upon her return to the house, the appellant pushed her onto the bed and raped her vaginally again. Thereafter he advised her that he and her were not going anywhere that day. She pleaded with him to permit her to go to work as she had meetings that day and people were coming from Pretoria. He agreed thereto. She intended to have a bath and ran the water but the appellant climbed into the bath. He complained that he had injured himself and she saw the injuries on his body. She saw pieces of glass at the toilet, cleaned it up and threw the glass into the dustbin. Upon exiting the house she noticed that the dustbin had been moved. Upon her asking the appellant whether the empty alcohol bottles were his, he confirmed same. They then left thehouse in their respective vehicles.

She subsequently discovered that the security spikes on the gate of her residence had been flattened and that burglar bars had been removed from the toilet window. She believed that the appellant had climbed onto the dustbin in order to gain access

through the toilet window. She further subsequently found a wheel spanner in her bathroom and believed that the appellant had struck her therewith.

4.4 The complainant testified that she was extremely emotional. She intended to stop at the Dobsonville police station but as the appellant was following her, she did not and proceeded to her workplace. Due to her emotional state, a guard there assisted her into the building. She did speak to a trauma counsellor but she could barely speak due to her emotional state.

4.5 She called her daughter informing her only that the appellant had done horrible things to her. A family friend subsequently accompanied her to the Honeydew police station where she reported the matter. Thereafter she went to reside with her daughter and informed the latter that the appellant had raped her. She was not satisfied with her police statement as they would not permit her to include all the details she wished to, save for the important issues, advising her that if she did not sign the statement they would not open a docket. She duly did so and was then taken for a medical examination.

4.6 The complainant was extensively cross-examined. Whilst it was common cause that she and the appellant had years before the date of the incident been involved in a sexual relationship, she disputed that they communicated or were dating and that she met up with him the year before and had engaged in sexual intercourse with the appellant in his vehicle. She further disputed that they were friends. She stated that after the breakup in 2007, the appellant had attempted to on various occasions to call her and from different numbers, but that she would terminate the call upon

realizing that it was him. She referred to an incident where the appellant had come to her house and fired two shots, which incident she did not report to the authorities.

She denied that the gate to her residence was open or unlocked and that the appellant had knocked at her kitchen door and convinced her to open for him. She disputed that the sexual intercourse was not consensual and steadfastly maintained that the appellant had broken into her residence and had repeatedly raped her. Upon being challenged as to why she had not informed the security company of what had transpired when they had called her or the colleague when she had called or arrived at her gate, she stated that she had complied with everything that the appellant had instructed her to do as she was in a state of fear and hopelessness and afraid of losing her life, the appellant having threatened to kill her. She maintained that the appellant would have been able to hear what she said to her colleague from the window where he was standing.

Upon it being put that the investigating officer had testified in the bail application that it appeared to him that the appellant was too large to fit through the toilet window, 41 centimetres in width and 90 centimetres in height, she responded that this was the only window in the house that was open and that three of the five burglar bars thereof had been removed. The appellant had complained that he had injured himself and of the pain on the side of his waist and she had seen the injuries when he entered the appellant had entered the bath.

5. Khumoetsile Maphunye testified. She is the complainant's daughter.

5.1 She stated that she knows the appellant, he being the brother of a friend she had in high school. On 17 February 2020 the complainant called her at approximately between 10h00 and 11h00, advising her that the appellant had come to her house and had done some horrible things to the complainant. She informed the complainant to come to her residence that evening.

5.2 Upon seeing that complainant that evening, the complainant had a blue eye and bruises. The complainant proceeded to tell the witness that the appellant had assaulted her and raped her multiple times. She was emotionally very distressed. The complainant further advised the witness that she had pressed the panic button and that the colleague had arrived at her residence, but that she was too fearful of the appellant and what he would do, to say anything.

5.3 The witness was extensively cross-examined. Nothing material emanated therefrom. The witness reiterated what she had stated in chief, namely that she does not have a clear recollection of everything that the complainant had advised her of, that had transpired.

6. Lebogang Ntetshane testified. He is the security officer who attended at the complainant's residence on the morning in question.

6.1 On the morning in question, at approximately 02h50, he responded to a panic button activation and attended at the complainant's residence. There, he

encountered a male at the gate of the premises who informed him that he resides at that residence and is waiting for the people inside the residence to open for him. It is not in dispute that this male is the appellant. Both the witness and the appellant then left the premises.

6.2 At approximately 03h30 he responded to a second activation of a panic button at the complainant's residence. Again he found the appellant at the gate who informed him that he was still waiting for the people to open the gate for him. The appellant then left the premises in his vehicle and so too did the witness. He was subsequently informed by his control that they had communicated with the client who had informed them that all was in order.

The following day he visited the premises and the client's daughter who showed him the broken windows and burglar bars which had been broken.

6.3 The witness was cross-examined extensively. He stated that he could not recall whether the appellant had remained at the residence on the second occasion after he had left. He was of the view that the size of the appellant's body was too large to fit into the toilet window. Nothing further material emanated therefrom.

7. Fatima Dawood testified. She is a medical practitioner with some 16 years experience.

7.1 She examined the complainant and recorded that the complainant had advised her

that she had been physically and sexually assaulted by a known person and that no lubricant or condom had been used.

7.2 The witness noted several external physical injuries including an a red and enflamed right eye, bruising and swelling to her left eye, swelling to her forehead, two old R1 coin size bruises on her left forearm, a bruise measuring 6 x 5 centimetres on her posterior left arm, multiple small bruises on her right knee and tenderness on the left flank.

7.3 Gynaecologically, she found a fresh linear tear in the posterior fourchette and Bruising around this tear.

The injuries were fresh and consistent with the history given by the complainant.

7.4 The witness was extensively cross-examined. She stated that to sustain these vaginal injuries, force would have been applied. Such injuries are not expected with consensual sexual intercourse, regard also being had to the fact that the complainant had had a vaginal pregnancy making that area elastic. Even had the complainant not engaged in sexual intercourse, these injuries would not occur. These injuries cause much pain.

She did not observe open wounds that were bleeding.

8. The State then closed its case.

9. The Defence made application for a discharge in terms of Section 174 of the

Criminal Procedure Act 51 of 1977. Same was refused.

10. The Defence then closed its case.

**ISSUES ON APPEAL**

11. The issues to be determined on conviction are whether the trial court erred in finding that the State had proved its case beyond reasonable doubt and in not finding the appellant's version to be reasonably possibly true.

**THE LAW**

12. It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the **proven** guilty are convicted. It is further trite that the Court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a common sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt. If his version is found to be reasonably possibly true, he must be acquitted. He can only be convicted if his version is found to be false beyond reasonable doubt.

**S v Hadebe & Others 1998 (1) SACR 422 (SCA)**

**S v Van Der Meyden 1999 (1) SACR 447 (SCA)**

**S v Phallo & Others 1999 (2) SACR 558 (SCA)**

**S v Van Aswegen 2001 (2) SACR 97 (SCA)**

**S v Shackel 2001 (2) SACR 185 (SCA)**

**S v Chabalala 2003 (1) SACR 134 (SCA)**

13. It is common cause that the complainant was a single witness to the offences.

It is trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.

**R v Mokoena 1932 OPD 79**

**S v Webber 1971 (3) SA 754 (A)**

**S v Sauls & Others 1981 (3) SA 172 (A)**

**S v Stevens 2005 All SA 1**

**S v Gentle 2005 (1) SACR 420 (SCA)**

**AD CONVICTION**

12. This Court is of the view that the State witnesses were credible and reliable witnesses.

12.1 Whilst there were various inconsistencies in the evidence of the complainant, particularly with regard to her police statement, she testified that she was not satisfied with same and was advised that were she not to sign same as prepared, a docket would not be opened.

In any event, I am further satisfied that the inconsistencies were not material in nature and find that the learned Magistrate correctly found the evidence of the complainant to be satisfactory in all material respects.

12.2 The independent evidence of the doctor corroborates that of the complainant in material respects.

12.3 Whilst there were inconsistencies in the evidence of the complainant's daughter, these were immaterial in nature and her evidence also corroborated that of the complainant in material respects.

12.4 There were also inconsistencies in the evidence of the security guard.

Similarly, these were immaterial in nature and his evidence also corroborated that of the complainant in material respects. His opinion and for that matter, that of the investigating officer, that the body of the appellant would not fit through the toilet window where it is alleged that the appellant gained access into the complainant's residence is simply that, an opinion.

13. Regarding the failure of the appellant to testify:

Whilst he has a right not to testify, the nature of the evidence against him certainly resulted in a case that he had to answer to. However, and notwithstanding his failure to testify, the stringent onus on the State remains the same and is in no manner altered

or diminished.

**S v Boesak 2001 (1) SACR 912 (CC)**

**Mphanama v S (1107 of 2020) [2022] ZASCA 11 (24 January 2022)**

It is trite that versions put on his behalf by his legal representative does not constitute evidence unless and until same is testified to by the appellant.

This Court is satisfied that having regard to the evidence tendered, the learned Magistrate correctly exercised her discretion in finding that a prima facie case had been established and in refusing the Section 174 application.

14. The version of the appellant and his failure to testify, leave several significant questions unanswered, inter alia:

14.1 apart from the vaginal injuries, which were argued as the result of rough sex, when, where and how did the multiple other physical injuries recorded by the doctor emanate or arise.

No version was put in this regard and counsel for the appellant was unable to make any submissions in regard thereto.

14.2 if this was consensual sexual intercourse as alleged, for what possible reason would the complainant report the matter. There was no manner in which her daughter, who was apparently partial to the appellant, ever had to find out about her mother's alleged night of blissful passion with the appellant.

Similarly, no version was put in this regard and counsel for the appellant was

unable to make any submissions in regard thereto.

14.3 why would the complainant activate the panic button on multiple occasions if she was expecting the appellant and there was no reason to do so.

14.4 why would the appellant himself wait outside in the street and park his vehicle in the street, encountering the security guard on both occasions, if, according to his version, the gate to the complainant's was open and he had thereby gained access to her premises.

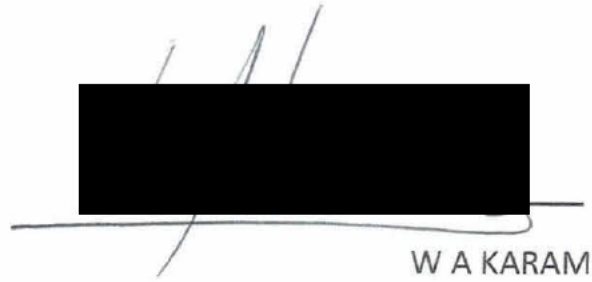
14.5 why would the complainant seek to falsely implicate the appellant and what was her motive in this regard.

15. Having regard to all of the aforesaid, and having considered the submissions of counsel, I am of the view that the learned Magistrate correctly convicted the appellant and rejected his version as not being reasonably possibly true.

16. Accordingly, I am of the view that there is no merit in the appeal.

17. In the circumstances, I propose the following Order:

17.1 The appeal against conviction is dismissed.



W A KARAM

ACTING JUDGE OF THE HIGH COURT

I AGREE

F J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

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|---|---|
| APPELLANT: | Adv C Meiring |
| | Instructed by BDK Attorneys |
| | Houghton |
| | Johannesburg |
| RESPONDENT: | Adv M Phatlanyane |
| | Director of Public Prosecutions |
| | Gauteng Local Division |