IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION,

PIETERMARITZBURG

Case No: AR140/2020

In the matter between:

AYANDA MTUNGWA **APPELLANT**

vs

THE STATE **RESPONDENT**

ORDER

The following order is granted:

1. The appeal is dismissed and the conviction and sentence are confirmed.

JUDGMENT

Mossop AJ (D. Pillay J concurring)

Introduction

[1] The complainant in this matter was in a love relationship with the appellant. She was the mother of a young boy, who at the relevant time was aged five, but the appellant was not the father of that child. The complainant and her child lived in the rural setting of Nhlababo.

[2] On 15 May 2018, the complainant suffered an injury to her head. The State alleges that the injury was sustained as a consequence of the appellant striking the complainant on the head with a toy pistol. This incident formed the basis of count 1, being a count of assault with intent to cause grievous bodily harm, that the appellant faced. He pleaded not guilty to this count when he appeared before the Regional Court in Inkanyezi.

[3] Three months later, on 19 August 2018, the appellant was attacked, stabbed at least 18 times, and raped in her place of residence. Her son was also stabbed twice in the head by the person who attached his mother. The State alleged that the attacker was the appellant. The appellant thus faced a second count of rape of the complainant and a third count of assault with intent to cause grievous bodily harm in respect of the attack on the young boy. He likewise pleaded not guilty to these two counts.

[4] On 16 January 2020 the appellant was found guilty on all three charges and was sentenced to 12 months' imprisonment on count 1, life imprisonment on count 2 and four years imprisonment on count 3, all of the sentences to run concurrently with each other. By virtue of the sentence imposed on count 2, the appellant has an automatic right of appeal in terms of the Judicial Matters Amendment Act 42 of 2013 read with section 309 of the Criminal Procedure Act 51 of 1977. No application for leave to appeal in respect of the conviction and sentence on counts 1 and 3 was delivered and accordingly this appeal involves only the conviction and sentence on count 2.

The hearing of the appeal

[5] This appeal has been set down to be heard during the COVID-19 pandemic when the country is at level 3 of the national disaster plan and during which period the Judge President of this Division has caused certain restrictions to be imposed relating to the hearing of trials and appeals. In particular, there are no criminal trials being permitted to run and no persons awaiting trial in detention are being delivered to court. There are a few options available to litigants involved in criminal appeals, one of which is to dispense with an actual or virtual hearing and to have the appeal determined on the papers.

[6] The appellant is conducting his own appeal and has delivered heads of argument drafted by himself in manuscript. However, having been convicted in the court *a quo* and sentenced to imprisonment, he is presently incarcerated and will not be delivered to court for the appeal because of the restrictions referred to above.

[7] As a consequence, it became necessary for this court to ascertain from the appellant how he wishes his appeal to be dealt with. At the request of the court, Legal Aid South Africa telephonically contacted the prison at which the appellant is serving his sentence and was fortunate to be able to speak personally to the appellant. The appellant indicated that he desired his appeal to be dealt with on the papers and further indicated that he did not require legal representation or Legal Aid. The court is indebted to Legal Aid South Africa and their Ms. Zina Annastasiou for their assistance in this regard.

[8] Pursuant to the appellant's wishes, this court will determine the appellant's appeal on the papers.

Background information

[9] The love relationship between the complainant and the appellant commenced in 2017. By August of 2108, it appears that the relationship had soured as a consequence of the complainant developing an affection for a third party. The appellant had come to know of the complainant's infidelity when he saw a message on her cellular telephone.

The evidence on count 2

[10] On the evening of 19 August 2018, the complainant was at home with her young son at approximately 21h00. She testified that the door to her dwelling was pushed open and she walked towards it in order to open it fully. She then observed the appellant at the door with a cane knife in one hand and a knife in the other. The electric light within the dwelling was on. The appellant walked into the dwelling and immediately struck the complainant with the cane knife on her forehead and asked why she had blocked his calls on her cellular telephone. By way of an aside, the complainant confirmed that she had, indeed, blocked incoming calls to her cellular telephone from the appellant because he was '*annoying*' her.

[11] The appellant then commenced stabbing the complainant with the knife, which he she described as being an Okapi knife. The first thrust of the knife was to her chest, just below the left collar bone and she was then stabbed repeatedly all over her body: on her back, the sides of her body, below her breast, her abdomen, her face, her finger on the right hand, her legs and even her feet.

[12] She then collapsed to the floor but the appellant picked her up and placed her on the bed. Her young son was on the same bed. The appellant then took a plastic bank bag and put it over his penis and raped the complainant.

[13] Having satisfied himself, the appellant turned his attention to the complainant's young son, who was still on the bed, swore at him and told him to '*Voetsek*' and then stabbed him twice on the right side of his head with the knife.

[14] The appellant then left but the complainant and her son remained in the dwelling until sunrise, fearful that he might still be outside. At daybreak, the young boy ran to the neighbour and summoned help reporting that he believed his mother was dead. The police and an ambulance later attended the scene and the complainant was removed to hospital. According to her reckoning, the complainant stated that she had been stabbed a total of 39 times. According to the doctor who attended to her physical wounds and who later testified at the trial, she was stabbed 18 times.

The appellant's defence

[15] To this detailed version of the complainant, the appellant asserts an alibi. He claims that he was not at her dwelling on the evening concerned. The existence of the alibi was not, however, revealed in the appellant's plea. It was first revealed in the cross examination of the complainant and was initially formulated as follows:

> 'On the date in question he will tell the Court that he was with his family members and friends, where he sells liquor, in his homestead.'

The appellant's legal representative indicated further that one Sakhele Manqele would be called to verify this alibi.

[16] The alibi explanation was not consistently adhered to by the appellant. In his evidence in chief he testified that he waited at his home for the return of certain people that he had sent to Stanger. On their arrival, he was asked to go to his family's main homestead where there was to be a meeting concerning a traditional function that was being planned and he and the people who returned from Stanger therefore proceeded to the main homestead. On route to their ultimate destination, they stopped at Khalayi store and purchased some alcohol. They then proceeded onward to the main homestead. At the main homestead, he received a telephone call at around 19h00 or 19h30 from a person he had left at his home. He was advised that a person had arrived there looking for him. He then left and returned home. He

indicated that he was at home when the people who accompanied him to the main homestead returned at approximately 22h30.

[17] It appears, however, on his own version that he did not remain at home after his arrival there from the main homestead. On his own version, he left at one stage to go to his neighbour's house. He also went back to the main homestead as he remembered that his aunt wanted some meat that he sold in town. When he arrived back there he found that his aunt was away and he then returned to his home.

[18] To make matters more confusing, the appellant indicated that he had had a braai at his home, not the main homestead, and at the time of the alleged rape, 21h00, he was in fact at home with the complainant's brother, one 'The'. Sakhele Manqele, also known as 'The', ultimately was not called by the defence to testify as promised.

The State witnesses Sokhulu and Mtungwa

[19] The State did, however, call Nthobisi Sokhulu (henceforth 'Sokhulu') and Skhumbuzo Mtungwa (henceforth 'Mtungwa'), two of the people who had gone with the appellant to the main homestead to discuss the planned traditional gathering.

[20] After Sokhulu appeared to deviate from his sworn statement and a partial attempt was made to discredit him as a hostile witness (which was not followed through to completion), it transpired that Sokhulu adhered to his sworn statement that at about 19h00 on the evening in question he and others had left the main homestead and gone back to Khalayi store to purchase more alcohol and that at that stage the appellant was no longer with them. The group had returned to the appellant's home and Sokhulu had gone to sleep at 20h30 at which time the appellant was still not present.

[21] Under cross examination by the appellant's legal representative, Sokhulu indicated that he was intoxicated and could not recall accurately what had occurred

but he agreed with the appellant's legal representative that he had found the appellant at his home when the group had returned from Khalayi store.

[22] Mtungwa testified that the appellant had left the main homestead before the group went to Khalayi store. He did not ever remember seeing the appellant again that day, only seeing him the following morning. Like Sokhulu, Mtungwa attempted to soften the impact of his evidence by conceding under cross examination that he did not notice the appellant at the appellant's home, meaning it was possible that he was there but had not been observed by him.

Alibi defences

[23] It is trite that there is no onus on an accused person to establish his alibi. If the alibi might reasonably be true then the accused must be acquitted. Furthermore, the alibi does not have to be considered in isolation from other evidence. The correct approach is to consider the alibi in the light of the totality of the evidence presented before court. In *R v Hlongwane*, Holmes JA stated as follows:

> 'At the conclusion of the whole case the issues were: (a) whether the alibi might reasonably be true and (b) whether the denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown has failed to prove beyond a reasonable doubt that the accused was one of the robbers.'[1]

[24] Thus, in considering the veracity of the appellant's alibi it is necessary that it be weighed against the totality of the evidence adduced in the case. The State should have led evidence linking the appellant to the crime, which evidence must be sufficient and credible.[2]

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[1] 1959 (3) SA 337 (A) at 339C-D.
[2] *Tshiki* v *The State* [2020] ZASCA 92 (18 August 2020) at para 33.

[25] In *S v Musiker,*[3] the Supreme Court of Appeal held that once an alibi has been raised, it has to be accepted, unless it can be proven that it is false beyond a reasonable doubt.

[26] In *S v Burger and others*,[4] it was held that where an alibi is presented and it contradicts evidence presented before the court, and the alibi later turns out to be a lie, the lie together with the other evidence of the accused as a whole may point towards his guilt in certain cases.

Single witnesses

[27] Section 208 of the Criminal Procedure Act 51 of 1977 allows that an accused may be convicted of any offence on the single evidence of any competent witness.

[28] There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told, despite any shortcomings or defects in the evidence.[5]

Evidence of identification

[29] Courts have repeatedly stated that the evidence of identification must be approached with caution. There is no doubt that honest witnesses may make mistakes because of the fallibility of human observation and therefore all the factors set out in *S v Mthethwa*[6] should be weighed up one against the other in the light of the totality of the evidence and the probabilities.

The complainant's alleged ulterior motive

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[3] 2013 (1) SACR 517 (SCA) at para 15-16.
[4] 2010 (2) SACR 1 (SCA) at para 30.
[5] *S* v *Sauls* 1981 (3) SA 172 (AD) at 180E-G.
[6] 1972 (3) SA 766 (AD) at 768A-C.

[30] As stated previously, the complainant and the appellant were not strangers to each other. They had been involved in an intimate relationship over several months. This renders it unlikely that the complainant was mistaken about the identity of her and her son's attacker. In addition, the unchallenged evidence of the complainant was that the electric light was on at the time of the attack, which would have assisted the complainant in effecting a reliable identification.

[31] Whilst their familiarity with each other renders the likelihood of mis-identification unlikely, it also raises the possibility of there being some other motive for the complainant to falsely implicate the appellant. Human experience tells us that the line between love and hate is often a very thin one.

[32] When the complainant was cross-examined by the appellant's legal representative, the following was put to her:

> 'He will tell the court that after this incident he is the one who wanted to break up with you, or he is the one who broke up with you.'

[33] The unexpressed assumption in that question appears to be that the position taken by the appellant to terminate the relationship had fuelled the complainant's desire to falsely incriminate him. Indeed, the appellant further suggested via his legal representative shortly thereafter in the cross-examination of the complainant that the complainant had disclosed to one Nobuhle Gumede that she was:

> '… planning something bad against him'.

Nobuhle Gumede was never called to testify by the defence.

[34] This version put to the complainant needs to be contrasted with the version advanced by the appellant when he testified in chief. He initially stated that:

> 'She then also apologised, and she told me that she cannot control herself when she is there, and she actually asked me again that I take

> her back to stay with me, because whenever she is staying there she cannot control herself. I told her that I do not have a problem, but however, we were going to still talk with her mother about her moving back with me, …'

[35] This appears to be at odds with what was put to the complainant by the appellant's legal representative. This impression is fortified by the further evidence in chief of the appellant when the following interchange between his legal representative and him occurred:

> *'When did your relationship end with the complainant? --- I'm still under the impression that we are still together, because when I ended the relationship she actually begged for love back, and I agreed.'*

[36] There would accordingly appear to be no basis for the suggestion that the complainant had contrived to falsely incriminate him because the appellant had terminated the relationship.

[37] Moreover, it was suggested to the appellant by the prosecutor that if the complainant's goal was to achieve the restoration of the relationship (which according to the appellant had already been restored) it was not clear how this could be achieved by falsely implicating him in a brutal crime which potentially could see him imprisoned. The appellant had no explanation for this.

[38] Given the complainant's unchallenged evidence that she had blocked incoming cellular telephone calls from the appellant because he was annoying her, his version that she desired the restoration of the relationship appears unlikely.

The appellant's alibi

[39] In my view, the appellant's alibi does not withstand close scrutiny.

[40] He himself admitted under cross-examination that there was a period of time when he '*disappeared*'. This fact was not disclosed when the alibi was first mooted during the cross examination of the complainant. The following extract from the State's cross examination of the appellant is illuminating:

> 'No, but they say at some stage you disappeared from them. They are … [inaudible] --- And I do not think the time that I had disappeared at my homestead would be the amount of time that I would go to her place, because it was just 30 minutes.'

[41] There was no evidence that the appellant disappeared from his homestead: the evidence of the appellant, as well as that of Sokhulu and Mtungwa, was that the appellant had disappeared from the main homestead. In addition, both Sokhulu and Mtungwa's initial versions were that the appellant was not at the appellant's home when they fell asleep.

[42] There is accordingly on the versions of the appellant and those of Sokhulu and Mtungwa a period when the appellant's whereabouts are unexplained. The complainant has, however, given an explanation of where the appellant was.

[43] An alibi is only as good as its details and the details in the appellant's alibi are, in my view, lacking.

Evaluation of the evidence

[44] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. In *S v Chabalala,*[7] Heher AJA stated that the correct approach is to:

> '… weigh up all the 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,

[7] 2003 (1) SACR 134 (SCA) at para 15.

> 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.'

[45] The only credible witness whose evidence could be relied upon on count 2 was the complainant. The evidence of her son was not satisfactory and could not, in my view, be relied upon. She was therefore a single witness whose evidence was relied upon to establish the identity of her attacker. She knew he attacker and the physical conditions allowed her ample opportunity to confirm his identity. The Learned Regional Magistrate accepted her evidence and she was correct to do so. Her evidence was satisfactory in all material respects.

[46] The appellant was not a good witness. He had a simple version on count 2 but even with such a version he found himself in difficulties, as alluded to previously. His alibi was contrived and incomplete and had an interlude where the only person who could confirm his whereabouts was the appellant himself.

[47] Finally, the conviction of the appellant on count 3 has some significance when it comes to the identification of the person who attacked the complainant and her son. The Learned Regional Magistrate found the attacker of the complainant's son to be the appellant. He has not challenged that finding and conviction. That places the appellant in the dwelling of the complainant on the evening in question.

[48] Considering all the evidence adduced, I am inexorably driven to the conclusion that the appellant's alibi was false, and that his denial of being at the complainant's dwelling was also false. The State led compelling evidence of his presence in the form of the testimony of the complainant who unequivocally identified her and her sons' attacker. I accordingly have little doubt that the Learned Regional Magistrate correctly rejected the appellant's alibi and convicted him.

Sentence

[49] The attack on the complainant was both brutal and cruel. It was prolonged and demeaning. Unspeakably, it was carried out in the presence of her young son who had the horrific experience of seeing his mother stabbed multiple times and raped.

[50] The incident was rendered more brutal in my view by the fact that the complainant's five year old son, whose only crime was to witness the unspeakable brutality visited upon his mother, was himself a victim of the appellant's cruelty. To stab a five year old child twice in the head requires a special degree of callousness.

[51] In my view, it matters not a jot that the complainant believed that she had been stabbed 39 times whereas the medical doctor who examined her wounds said that she had suffered only 18 stab wounds. The doctor described the wounds that she sustained as life threatening. There is thus no doubt that the complainant suffered grievous bodily harm as contemplated by the Criminal Law Amendment Act 105 of 1997.

[52] The appellant clearly believed he had done enough to kill the complainant. After he was finished, he informed the complainant's young son that:

> 'If anyone asked who killed your mother, you must say it is Spa.'

[53] That the complainant survived is remarkable. As Advocate Harrison who prepared the respondent's heads of argument stated, whether the complainant was stabbed 18 times or 39 times, she would in all likelihood be traumatised by this terrible ordeal.

[54] Given the unchallenged conviction on count 1, there is an established chain of violence perpetrated by the appellant against the complainant. It is precisely such wanton acts of violence against women in the sanctity of their homes that society requires to be stopped.

[55] In my view, the only possible sentence that the Learned Regional Magistrate could impose was the minimum sentence prescribed. She did so and she was, in my view, correct in doing so.

Conclusion

[56] Accordingly, I propose that the appeal be dismissed and the conviction and sentence be confirmed.

Mossop AJ

Acting Judge of the High Court of KwaZulu-Natal

I agree and it is so ordered.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

APPEARANCES

NB: The country is in lockdown level 3 due to Covid-19.
With the consent of the parties, the matter was dealt with on the papers and judgment was handed down electronically and emailed the parties.

Counsel for the appellant	:	The appellant conducted his own appeal.
Counsel for the respondent	:	Advocate Xaba DPP Pietermaritzburg RXaba@npa.gov.za
Date of Hearing	:	5 February 2021
Date of Judgment	:	5 February 2021