THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO. A19/2021
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

IN THE MATTER BETWEEN:

BONGINKOSI JACKSON NKOSI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MTIMUNYE AJ:

INTRODUCTION:

[1] This appeal is against the conviction of Rape and effective sentence of life imprisonment imposed upon the appellant on 6th August 2020, by the Regional Court, sitting at KwaMhlanga. The appellant enjoyed legal representation right through the trial.

[2] Due to the imposition of the sentence of life imprisonment by the Regional Court, the appellant has an automatic right of appeal by virtue of section 309(1) of the Criminal Procedure Act 51 of 1977 read with sections 10,11 and 43(2) of the Judicial Matters Amendment Act 42 of 2013.

CONCISE FACTS:

[3] The appellant was charged with one count of rape read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1977, ("the CLAA"). The state contended that this provision of the CLAA is applicable as the complainant was allegedly raped more than once and grievous bodily harm also inflicted on her during the incident.

[4] The complainant's testimony was that the appellant knocked at her shack. When she ignored him he broke her door in order to gain entry. She screamed and ran outside and the appellant followed her and assaulted her with clenched fists and strangled her for making noise. He grabbed her by her neck, dragged her to his house wherein he raped her on a small bed in the room. He thereafter moved her to another bed and raped her again. He later released her after people came knocking at his door and she eventually went to her house.

[5] Dr. Luzinga who examined her noted the following injuries on her person: abrasion on the lower lip, two missing teeth, bruises on her neck, both knees and thigh. He noted that there no obvious injuries on her private parts.

[6] A neighbor, […] stated that she heard the screaming and peeped through the window and saw that the appellant was assaulting the complainant and pulling her to his house. She called the complainant's daughter and notified her.

[7] The appellant's version was that the complainant was his secret lover and she came to his place at night as his wife was away on that day. He said she demanded R2000,00 and he told her he did not have money. He alleges that she then went outside screaming. He denied having had sexual intercourse with her or assaulting her. The trial court correctly rejected the appellant's version and found him guilty or rape.

[8] It is trite that in every criminal matter the onus is always on the State to prove the guilt the accused beyond reasonable doubt before a conviction can result. See *S v T* 2005 (2) SACR 318 E. An accused person bears no onus to prove his innocence. Where his version is reasonably possibly true in substance, the court must accept that version. While the accused's version cannot be accepted willy nilly against the inherent probabilities, it also cannot be rejected merely because it is improbable. It can only be rejected if it can be said to be so improbable that it cannot reasonably possibly be true. See *S v Shackell* 2001 (4) SA 1 (SCA) at 30.

[9] The appeal court is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. In the circumstances, having duly considered the totality of the evidence, I am satisfied that the court *a quo* was correct in accepting the evidence of the complainant, finding that it was satisfactory in all material respects and rejecting the evidence of the appellant. Accordingly, in my view the conviction of rape is correct and does not require any further scrutiny. However, what needs to be determined is whether the complainant was raped more than once. I deal with this issue below as it is relevant to sentence.

AD SENTENCE

[10] It is trite that the circumstances in which a court of appeal may interfere in sentencing discretion of a lower court are limited. *S v Monyane and others* 2008 (1) SACR 543 (SCA). The findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See also *S v Hadebe and Others* 1997 (2) SACR 641 (SCA); *S v Francis* 1991 (1) SACR 198 (A). There must be either a material misdirection by the trial court or the disparity between the sentence of the trial court and the sentence of 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". See *S v Malgas* 2001 (1) SACR 469 (SCA) at 478 D – G.

[11] In *S v Rabie* 1975 (4) SA 855 (A) at 857 D – E the court stated the following:

"In any appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal -

(a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and;

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

[12] In *S v Malgas, supra,* the Court stated the following in applying a broadened scope for the interference:

> *"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 emphasized 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".*

[13] Having due regard to the aforementioned principles, it is clear that the Court of Appeal generally has a limited scope to interfere with the discretion of the trial court. The Court of Appeal is, however, still empowered to interfere with the trial Court's sentence where for example the discretion was not judiciously exercised or in the event

the trial court erred in respect of the finding as to whether substantial and compelling circumstances are present. This is so even in the absence of material misdirection or a failure of the exercise of discretion. *S v Tafeni* 2016 (2) SACR 720 at 723

[14] In this case the appellant was convicted of one count of the rape of an adult more than once which attracts a prescribed minimum sentence of life imprisonment in terms of Section 51(1) of the CLAA. Furthermore, this provision is rendered applicable due to the fact that the victim also sustained grievous bodily harm. In such circumstances, unless the court finds substantial and compelling circumstances present, it is compelled to impose the prescribed minimum sentence.

[15] In view of the grounds of appeal and issues raised, it is necessary to determine whether the complainant was raped more than once and whether suffered grievous bodily harm in the incident. The complainant merely testified that the appellant put her on a small bed and raped her and thereafter moved to another bed in the same room where she was again raped. The appellant referred to and relied on *S v Tladi* 2013(2) SA SACR 287 (SCA) 291, where the court said *inter alia* the following:

> "...*The evidence against the appellant is therefore limited and insufficient to establish his guilt on two separate counts of rape. The trial court should have analyzed the states' evidence and should have concluded that only one rape had been proved beyond reasonable doubt*".

[16] It was argued on behalf of the appellant that this reasoning and approach is relevant and on all fours with the present case. I am of the view that it is indeed correct that from the evidence of the complainant not sufficient details are available to enable one to determine whether this rape was a continuous act or two different acts. The appellant's version that it was one continuous act is therefore not improbable. In fact, it as in *Tladi,* the trial court's finding that it was two separate acts of rape is not supported by evidence. In a case such as this one a court should err in favour of the accused. I agree with the appellant that the court erred in this regard and therefore interference is

justified. The appellant should therefore have been found guilty of one rape and not rape more than once. On this reasoning the provisions of section 51 (1) of the CLAA cannot apply.

[16] The next question is whether the section 51 (1) (c) of the CLAA providing for a sentence of life imprisonment in respect of rape involving the infliction of grievous bodily harm is applicable. The complainant testified about the assault she was subjected to at the hands of the appellant. He punched her with fists on her face, dragged her and strangled her. Although one neighbor witnessed the assault, it was Dr. Luzinga's evidence which corroborated that of the complainant regarding the injuries sustained. He noted that the complainant had bloody stained clothes, abrasions on her lower hip, neck, knees and thigh. In addition, she lost two teeth. Despite these reported injuries, it was startlingly argued on behalf of the appellant that she did not sustain serious injuries apparently because she was assaulted with bare hands. This contention is not only preposterous but it also without merit. Section 51(1) (c) does not require the injuries sustained to be life threatening. In *S v Rabako* 2010(1) SACR 3109 (O) Paragraph 7, Musi J defined grievous bodily harm as not to be permanent life threatening, dangerous or disabling. The injury must be serious. The complainant in this matter clearly sustained serious injuries. The rape therefore warrants and justifies the invocation of section 51 (1) of the CLAA.

[17] Next the issue of the presence or otherwise of substantial and compelling circumstances comes into play. It is trite that no single factor can be substantial and compelling circumstances, and the correct approach is to look at all the factors cumulatively. I am mindful of the fact that alcohol on its own cannot interfere with a prescribed minimum sentence. However, the consumption of alcohol is relevant in the consideration of a sentence since it can affect an accused's moral blameworthiness. To this end, I am satisfied that the court *a quo* correctly analyzed and applied the relevant aggravating and mitigating factors including the appellant's personal circumstances.

[18] After a careful consideration I am satisfied that the court *a quo* properly took into

account all the relevant factors that needed to be taken into account when determining whether there were substantial and compelling circumstances present. I am in agreement with the trial court correctly decided that even if taken into account cumulatively, all these factors do not establish the presence of substantial and compelling circumstances, entitling this Court to intervene on the sentence imposed. In the absence of substantial and compelling circumstances there is no justification for interference with the sentence imposed *a quo*. The appeal in respect of sentence therefore also stands to be dismissed.

[19] In the result, I would propose the following order:

The appeal against conviction and sentence is dismissed.

MTIMUNYE J
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered,

LANGA J
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Appellant:	Advocate Zweli Zakwe
Instructed by:	Mabunda Attorneys
Email:	info@imabundalaw.co.za
Counsel for Respondent:	Advocate LTJ Motheogane

Instructed by:	Director of Public Prosecutions
	Mpumalanga
Email	Lmotheogane@npa.gov.za
Date of Hearing:	10 March 2023
Date of Judgment:	24 March 2023