IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

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

2023/02/10
DATE

[redacted]
SIGNATURE

Appeal Case Number: **A14/2022**

In the matter between:

PHIWAYINKOSI MUZIWENHLANHLA BUTHELEZI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MANKGE J:

INTRODUCTION:

[1] This appeal judgment addresses both conviction and sentence and the approach taken by the trial court in rejecting the appellant's version that he had a consensual sexual intercourse with the complainant.

[2] The judgment also addresses the question whether the trial court was correct in sentencing the appellant for lifelong imprisonment, where the evidence did not illustrate with sufficient particularity the description of the co-perpetrator, and it correctly concluded that the rape was committed under the circumstances where the victim was raped by more than one person and that such persons acted in the execution or furtherance of a common purpose or conspiracy (Part I Schedule 2)

[3] Whether with all the above the conviction and sentence of the appellant could be sustained.

[4] The appellant Phiwayinkosi Muziwenhlanhla Buthelezi was arraigned in the Regional Court Secunda. He tendered a plea of not guilty to the charge of contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provision of Section 51(1) and Schedule 2 of the Criminal Law Amendment Act, 105 of 1997, as amended. The State was alleging that he unlawfully and intentionally committed an act of penetration with Ms. NVM without her consent by inserting his penis into her vagina.

[5] Due to the complainant's age, in this judgment she shall be referred to as Ms. NVM only.

[6] The appellant who was legally represented was subsequently convicted of the above-mentioned charge. The trial court found no substantial and compelling circumstances that warranted the imposition of a sentence less than the one prescribed in the Criminal Law Amendment Act 105 of 1997. He was accordingly sentenced to Life Imprisonment.

[7] The record of the proceedings reveals that the state led the evidence of the Ms. NVM as well as the evidence of the investigating officer to support the State case on the charge against the appellant. The record further reveals that the appellant's contention throughout his trial was that he had consensual sexual intercourse with Ms. NVM and that he was alone when this sexual intercourse was committed on Ms. NVM.

[8] The appellant opted to testify in his defence during the trial. During his evidence he confirmed what he disclosed during his plea explanation that, that he has sexual intercourse with the Ms. NVM and that the sexual intercourse was consensual.

THE FACTS OF THE APPEAL

[9] In the early hours of 28 July 2019, Ms. NVM had been at a place known as Bar Jozi attending a friend's event. Even though the place was a drinking place she was not consuming any liquor as she was four (4) months pregnant. When she left the said place she walked alone home. Whilst walking back home from the

said place she came across two male persons, they grabbed her, threw her on the ground, and they searched her and took from her a cell phone.

[10] The two male persons thereafter took her into a shack, they raped her interchangeably. Her testimony was that whilst the other male was holding and pressing her down the other would be inserting his penis in her vagina and committing sexual act on her. After they finished, they left her in that shack. She then proceeded to her friend's place and requested him to accompany her to the police station where she reported the rape for the first time.

[11] Ms. NVM identified the appellant as one of the male persons who raped her, she had also identified him in the identity parade as a person who raped her. A condom was not used by these males. She was then taken to Bernice Hospital where she was assisted by a doctor.

[12] The investigating officer's testimony was that the appellant was unknown to Ms. VNM, and because of this reason he was arrested only a year after the rape was reported. The investigating officer testified also that, the appellant was linked through a DNA which matched the DNA swab taken from Ms. VNM.

[13] The appellant testified that he proposed love to Ms. VNM and he had several encounters of sexual intercourse with her. When he had sexual intercourse with her for the last time it was at his home, and this sexual intercourse was with the complainant's consent. He denied raping her and he also denied that he was with any other person when he had sexual intercourse with the complainant.

ANALYSIS OF THE EVIDENCE

[14] The accused was convicted after the trial court was satisfied on the evidence of a single witness, that the appellant and his accomplice had raped Ms. VNM.

On credibility finding of a single witness

[15] As far as the credibility finding that is made in respect of a single witness, the Supreme Court of Appeal held in ***S v Pretorius 2014 (2) SACR 315 (SCA)*** at para 30 that: "*It is a time-honoured principle that once a trial court has made a credibility finding, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong".*

[16] It is noted also that the trial court started by warning itself against the dangers inherent to the evidence of a single witness and that it was required to approach it with caution, it drew an inference on Page 145-146 as follows: "*mindful of the fact that the demeanour of a witness in court per se a(sic) reliable indicator of truthfulness and that it is instead a rather fallible guide to reliability. The court feels compelled to make some remarks about her evidence. Concerning her disposition and demeanour whilst testifying, the court has seldom in its 35 years on the bench seen a witness who displayed such firmness, resolve, persistence and steadfastness whilst testifying about an event which no doubt memorable, unpleasant as it was. . . During cross-examination she stood by her version and did not contradict herself in any essential aspect. . . Her version bears no*

inherent improbabilities"

[17] It was not in dispute that the accused had sexual intercourse with Ms VNM. The only aspect which the state needed to establish was whether this was with the consent of Ms VNM, whether when committed it was committed by more than one person, and whether such person acted in the execution or furtherance of a common purpose or conspiracy.

[18] The state relied on the testimony of Ms VNM who was the only witness who testified on this particular aspect. The same Ms VNM which the trial court found that her version bears no inherent improbabilities.

[19] On the basis of the above alone, I am of the view that the credibility findings that the trial court has made on Ms VNM looking at it vis-à-vis the entire evidence against that appellant that, the trial court cannot be faltered on its finding on the credibility of this single witness Ms VNM.

[20] The trial court also found that the investigating officer (the second State witness) *"made a very favourable impression on the court as a witness".* On the other end of the spectrum the trial court found the appellant did not make a favourable impression on the court as a witness and that he version was riddled with inconsistences, the trial court made a number of examples where the appellant was not able to answer questions on cross-examination. When the entire cross-examination of the appellant is followed I find myself agreeing with the trial court on the appellant's version.

[21] There is in my view no reason and none whatsoever, which can justify interference with these findings. They are well articulated and well-reasoned in the trial court's judgement. As guided by the Supreme court of Appeal this court seating as an appeal court would have only been justified to do so if it were to find that the trial court was wrong, in the entire reasoning of the trial such wrong cannot be found.

[22] The evidence on record established that the appellant was arrested a year after the rape was reported, and the evidence of the investigating officer supports that one of Ms VNM only to the extent that, the appellant was unknown to Ms VNM. On the basis of this undisputed evidence alone, I find that the trial court was not wrong in rejecting the appellant's defence of consensual sexual intercourse. I also find it improbable the appellant could have consented to sexual intercourse to someone that she did not know, which she could identify only through an identification parade.

[23] The trial court, found the evidence of Ms VNM believable, this is discerned from its well-reasoned judgment, and it proceeded to reject the appellant's version in so far as it differs from the State's version as false. The trial court also rejected the evidence that the appellant was alone when he had sexual intercourse with Ms VNM. Based on the trial court's reasoning in accepting the evidence of Ms VNM, then its final conclusion that the appellant was raped by the appellant whilst he was together with his accomplice cannot be faltered in my considered view.

[24] In the circumstances I find that if the evidence of Ms VNM and the supporting evidence of the investigating officer satisfied the trial court as it did. The appellant's contention that the trial court erred in its finding that the appellant version is not reasonably possible true that he had consensual sexual intercourse with the complainant cannot be sustained. The trial court in my respectful view concluded correctly that *"it is highly improbable that the accused's version can have any form of truthfulness"* and also correctly rejected the appellant's version as highly improbable.

Appeal on the Sentence

[25] The appellant's counsel contends that the court *a quo* misdirected itself sentencing Mr. Buthelezi to Life Imprisonment and that the sentence is harsh and not appropriate sentence taking into account that the State failed to prove its case beyond reasonable doubt that the complainant was raped by two persons. I have already found above that the trial court's finding on this point cannot be faltered, accordingly the appellant's argument on ground stands to fail.

[26] The appellant contention is further that the trial court should have considered the appellant's personal circumstances and the fact that he is a first offender that it constituted substantial and compelling circumstances and that life imprisonment is *"unduly harsh"* on the appellant.

[27] This court as an Appeal court can only exercise its powers to interfere with the sentence only if it appears that, (*a)* there was an irregularity, and (*b)* that a

failure of justice has in fact resulted because of this irregularity (**See:** section 304 Criminal Procedure Act 51 of 1977).

Prescribed minimum sentence

[28] Section 51(1) read with Part 1of Schedule 2 of the Criminal Law Amendment Act prescribes a minimum sentence of life imprisonment in the circumstances when rape was committed by more than one person, where such person acted in the execution or furtherance of a common purpose or conspiracy.

[29] In terms of section 51(3)(a) the Court may, however, deviate from the minimum sentence prescribed if it can find that there are substantial and compelling circumstances justifying imposition of a lesser sentence than that which is prescribed. In that regard, the court shall enter those circumstances on the record of the proceedings and thereupon impose such a lesser sentence.

[30] The Supreme Court of Appeal in ***S v Malgas*** **2001(1) SACR 469 (SCA**) set out in ten (10) points approach how the concept of 'substantial and compelling' circumstances should be approached. For the purposes of this appeal and the reasons advanced by the appellant I will only highlight point "B" "C" "I" and "J":

> *"B"* Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily, and in the absence of weighty justification,

be imposed for the listed crimes in the specified circumstances.

"*C*" Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardized and consistent response from the courts.

. . .

. . .

. . .

"*I*" If the sentencing court, on consideration of the circumstances of the particular case, is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

"*J*" In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed *in lieu* of the prescribed sentence should be assessed paying due regard to the benchmark which the Legislature has provided."

[31] Accordingly, for any court to come to a well-balanced conclusion, it should consider the totality of the evidence before it, together with other relevant factors traditionally taken into account when sentencing, also with the principles

as set out in amongst others in *Malgas* referred to above.

Evaluation on Sentence:

[32] The appellant Mr. Buthelezi's personal circumstances were placed on record by his counsel. He presented factors to be taken into account when his sentence is considered. He placed the following as his substantial and compelling circumstances, that, "*he is 31 years of age, he has two children he is a first time offender. He is the sole breadwinner and he was a primary caregiver of these two minor children*". this was really the only circumstances that were mentioned as compelling and substantial in his case.

[33] The record of the proceedings established that the court *a quo,* in sentencing Mr Buthelezi, considered what has become known as the triad, namely, the crime, the offender and the interests of society. See ***S v Zinn*** **1969(2) SA 537 (A) at 540G**. It is also evident from the record that the principles as set out in ***Malgas*** *(supra)* were considered by the court *a quo* in the sentencing of the appellant.

[34] The court *a quo* presented a very short judgment on sentence. The court highlighted amongst other factors, the fact that Ms VNM was four months' pregnant woman who was grabbed, brutally thrown down, dragged and pinned down whilst the other person was raping her. The trial court highlighted that she had no chance to defend herself against the brutal attack by the appellant

and his accomplice (The underlined part is a clear indication of the court's view on this sexual assault, that it can only fall within a purview of part I Schedule II), the articulation by the trial court was over and above its finding on the conviction of the appellant, thereby emphasising the applicability of the minimum sentence in the case of Mr Buthelezi. The trial court concluded that there was nothing that can be regarded as substantial and compelling in the appellant's circumstances for deviation.

[35] The above is a clear indication that the court applied its mind on the above-mentioned, (*Triad)* and only after this exercise, it concluded that it was not going to deviate from the ordained minimum sentence for this type of a crime.

[36] The notion of 'substantial and compelling' circumstances has not been defined in the legislation. What is, however, important to note is that a departure from the prescribed sentence need to be justified by a court after having regard to the weight of all the relevant factors cumulatively. It therefore improper for any court to deviate from the prescribed minimum sentence for flimsy or inadequate reasons.

[37] The court is ***Malgas*** at para 25 went further and appreciated the fact that "*It is they (presiding officers) who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not to pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed*".

[38] I have mentioned above what was submitted by the appellant as substantial and compelling reasons.

[39] This was really the only information that Mr Buthelezi presented for the trial court to work with for the purposes of sentence and from the record of the proceedings it is clear that the court considered this information before passing sentence.

[40] Now, for the appellant to argue before us that the court misdirected itself and that the life imprisonment is unduly harsh, when this was weighed up thoroughly by the trial court is in my respectful view asking this court to depart from the ordained sentence from the abstract, and to do exactly what Marais JA warned against in ***Malgas*** case.

[41] It is so that, for the circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender (***S v Pillay* 2018 (2) SACR 192 (KZD) [10].**

[42] I am in respectful agreement with the trial court in its finding. The personal circumstances of the appellant even the cumulative effect thereof did not, (even before us seated as an appeal court), still do not carry sufficient weight to tip the scale in his favor to necessitate any departure from the ordained minimum sentence.

[43] I am accordingly satisfied that even though there is a discretion to deviate under section 51(3) (a) of the CLAA, the fact that the court *a quo* did not deviate was a proper decision under the circumstances. I am of the firm view that if it did, that would have been equivalent to doing so for "flimsy" reasons taking into account the facts that was presented before it for sentence purposes. The merits of this particular case called for the strict compliance with the Minimum Sentence.

[44] I am in respectful agreement with the trial court's decision, based on the type of crime that the appellant was convicted of. The personal circumstances of the appellant should recede into the background looking at the type of offence and the circumstances under which it was committed and the effect this had on a minor child as highlighted by the trial court. In this regard I also highlight the following excerpt from the Supreme Court of Appeal in ***S v Vilakazi* 2009 (1) SACR 552 (SCA)**:

"In respect of serious crimes the personal circumstances of the offender recede into the background once it becomes clear that the crime is deserving of a substantial period of imprisonment, whether the accused is married or single, whether he has two children or three, whether or not he is employed, are themselves largely immaterial to what the period should be."

[45] Taking all the above into consideration, I am of the view that the court *a quo* sentenced the appellant correctly. There was no irregularity and/or misdirection on the sentencing of the appellant. The appeal on sentence therefore must fail.

[46] In the result the following order is made:

The appeal on both conviction and sentence is dismissed.

[redacted]

M.T Mankge

Judge of the High Court

I agree.

[redacted]

Vukeya LD

Judge of the High Court

DATE OF HEARING: 02 December 2022

DATE OF JUDGMENT: 10 February 2023

For the Appellant: Mr. MC Mavasa

For the Respondent: Adv LTJ Motheogane