IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO. : CA&R 311/2015
Heard on : 16 March 2016
Date delivered: 6 May 2016

In the matter between:

P. M. **Appellant**

And

THE STATE **Respondent**

JUDGMENT

MAJIKI J:

[1] The appellant was charged and convicted of rape in the Regional Court of Port Elizabeth. The state had invoked the provisions of section 51 (1) of the Criminal Law Amendment Act 105/1997 (the Act) in the event that he was convicted of the offence. The charge sheet referred to "*section 51(1) and schedule 2*." During the trial the appellant's legal representative only placed on record that "the appellant was informed of the relevant minimum sentence." It is also not clear from the record as to why the provisions of the Act were

invoked. However, the evidence reveals that the complainant was raped by more than one person. The circumstances of the offence therefore fall under one of the instances that are provided for in Part 1, Schedule 2 of the Act for which a minimum sentence of life imprisonment is applicable, unless the court finds that there are substantial and compelling circumstances justifying the imposition of a lesser sentence. The appellant was sentenced to life imprisonment. The cause of complaint arose on 30 October 2004 but the matter could only proceed in August 2013 due to the fact that the appellant had taken ill. His co-perpetrator, Ndumiso, was convicted and sentenced to 9 years imprisonment in a separate trial on 23 July 2010. The appellant now appeals against his conviction and sentence in terms of the automatic right to appeal as provided in section 309 B of the Criminal Procedure Act 105 of 1977 (the CPA).

[2] The respondent supports the whole judgment of the court *a quo*. The appellant denies that he raped the complainant.

[3] The appellant's grounds of appeal are that:-

3.1 The complainant could not have made a reliable identification of the appellant in the circumstances of this case.

3.2 The court *a quo* erred in rejecting the appellant's explanation of how his sperm could possibly have been transferred to the complainant's vulva, other than during sexual intercourse.

3.3 The sentence induces a sense of shock and is inappropriate in the circumstances of this case. The court a quo ought to have found substantial and compelling circumstances to deviate from imposing the prescribed minimum sentence of life imprisonment.

3.4 The state failed to prove that there was prior agreement between the appellant and Ndumiso to indicate that they acted in furtherance of a common purpose in as far as the commission of the offence is concerned.

[4] The following facts are common cause; on 30 October 2004 the complainant was raped by two people in turns, in the room of the appellant, without a condom. The rape was her first sexual encounter. Ndumiso partly disrobed the appellant, another man entered. Ndumiso left, that man undressed her fully and raped her. Ndumiso re-entered after the said man had finished. Ndumiso then raped her as well. She was physically assaulted during the rape. She had taken three tots of brandy earlier and was a bit tipsy. Her injuries included a human bite teeth mark on her chest, between her breasts; abrasions with tears in the labia minora; the hymen was not intact, it had some swelling and fresh tears; the vagina was slightly bleeding and admitting two fingers. The forensic swabs were taken from the complainant. The report of the DNA analysis was that the sperm cells within the semen in the complainant's vulva positively matched the profile in the appellant's blood sample.

[5] The remaining relevant facts according to the complainant are that the complainant was attending a traditional ceremony at her aunt's home with her father. There she partook in alcohol. Late in the day around 19h00 she accompanied one T. to a local tavern. On the way they met Ndumiso who was known to T.. Whilst they were in the tavern they were seen by T.'s sister's boyfriend. He chased them away saying they were too young. T. resisted and the complainant left alone. She again met Ndumiso who now pulled her, assaulted her and forced her to the appellant's room. She could not notice if he opened with a key or not. He continued assaulting her and he closed her mouth

when she cried. He undressed her of her pink top and took off her spectacles. When she was still left with a three quarter pants on, there was a knock at the door. She jumped to the door, hoping that the said person would rescue her.

[6] The appellant entered and instead kicked her towards the bed. Ndumiso left the room. The appellant completed undressing her by taking off her pants. He throttled her. He also undressed himself and raped her without a condom. When she tried to push him away he continued to assault her. He ejaculated. He then stood up and went to open the door for Ndumiso. Ndumiso entered and also raped her. She heard someone shouting the appellant's name. The said person pushed the door and entered. That is when she managed to get out and run to the main house. She eventually ran to another house in that neighbourhood belonging to one Mrs D.. Her father and aunt found her in that house and took her home. She left her panties and spectacles in the room where the rape took place. She could only relate her ordeal to her aunt the next day as her aunt's house had been full of people.

[7] According to the appellant, he met the complainant and Ndumiso that night. It was his first time to see her. Ndumiso asked for his room key and said he was going there with his girlfriend. The appellant then proceeded to the tavern with his friends. He only came back after about two to two and a half hours. On their way back they met two ladies who told him that the person who occupied his room raped a girl in there. He told those ladies that, had he noticed something funny, he would not have given Ndumiso his room key. He went to sleep and had sexual intercourse with his girlfriend without using a condom. Even in his previous encounters he was not using a condom. On the next day the complainant and her aunt arrived at his home looking for the complainant's spectacles. The appellant was with his girlfriend. The complainant's aunt explained what had happened. It is only then that he

realised that the complainant was the woman who was with Ndumiso the night before. He apologised to them for having given his room key to Ndumiso.

[8] Most of the complainant's evidence about the arrival of the appellant's brother, Thembelani, was confirmed by Thembelani. He added that when he was outside knocking, Ndumiso responded that he was not Philile but Ndumiso. After he opened he noticed that the complainant was drunk. She wanted to walk away naked. He stopped her and asked her to get dressed. She took her jersey and put it on where she was supposed to put on her pants. The complainant told him their house was her home.

[9] The issue for the appeal is whether the appellant was reliably identified by the complainant. Furthermore, whether there is another reasonable inference that can be made, with regard to the fact that the appellant's semen was found in the complainant's vulva, without the appellant and the complainant having had sexual intercourse.

[10] The magistrate found that having approached her evidence with caution, because the complainant was a single witness, she was a reliable and trustworthy witness. Her evidence had no inherent improbabilities. Her evidence to a large extent was corroborated by Thembelani and Mrs D. (the appellant's neighbour). Mrs D. differed with the complainant only with regard to the fact that the complainant said she had told Mrs D. that she was raped, at the time she ran into her house. Mrs D. had testified that the complainant told her that she was scared of being raped.

[11] With regard to the evidence of the DNA results, the magistrate found that, based on the expert testimony of Mr Koenze, about it being highly

unlikely that the semen could get into the vulva without sexual intercourse, it was improbable that the complainant would falsely accuse the appellant.

Mr Koenze is a forensic science laboratory expert witness within the South African Police Services. He examined and analysed the samples for DNA from the swab taken from the complainant's vulva and appellant's blood, in the biology unit. The magistrate accepted the evidence about the DNA results as corroborating that the complainant was raped by the appellant.

[12] During the hearing of the appeal Mr Geldenhuys, who appeared for the appellant, argued that there was no light in the room at the time the complainant was raped. She told the court that she had poor eyesight and was tipsy. The scene was violent and volatile. She could not have reliably identified her assailant. She only related the name of the appellant because there were instances when the appellant's name was mentioned, that the room belonged to the appellant. She was susceptible to suggestibility. Furthermore, because the room belonged to the appellant his DNA could be found in there. He was however not able to persist in this submission, when the court pointed out to him that what was found was not any DNA, but one from the semen, found in the complainant's vulva.

[13] I agree with Ms September, for the respondent, that the magistrate correctly accepted the evidence of identification. The complainant stated that she was able to identify the appellant. She said even though the lights were off, not everything was blank. She saw the appellant, right in front of her, raping her. I am also of the view that the evidence of the DNA results was correctly accepted. The state therefore proved its case against the appellant beyond reasonable doubt.

[14] As regards sentence, Mr Geldenhuys submitted that the state failed to prove that the complainant was raped by more than one person in execution or furtherance of a common purpose. In order to sustain the sentence of life imprisonment the court has to find that the respondent satisfied this requirement as required in Part 2 of Schedule 2 of the Act. I will refer to the provisions of the section later in the course of this judgment, except to state that Mr Geldenhuys should have referred to Part 1 of Schedule 2. He submitted further that, in the alternative, this court should find that the court *a quo* ought to have found that there are substantial and compelling circumstances justifying a deviation from the imposition of a minimum sentence of life imprisonment.

[15] The respondent supports the sentence. Even though the issue of rape by more than one person acting in furtherance of a common purpose was not addressed earlier in her heads of argument, Ms September, during the hearing submitted that the facts of the case prove that Ndumiso and the appellant acted in concert. Their actions were co-coordinated, it appeared clearly that both of them knew that rape would occur and they acted accordingly, at the same place.

[16] The magistrate's finding in this regard is recorded as follows:

"He (Ndumiso) dragged her to your room and while he struggled to get rid of her clothes you entered the room. You took over. You continued assaulting her and despite the fact that she was not interested at neither you or your co-accused's advances you just continued. You raped her. When you left the co-accused entered the room and you raped the complainant too"

I believe in the latter part it was a mistake to refer to Ndumiso. In actual fact the appellant raped the complainant first and then Ndumiso subsequently raped her after the appellant had left the room. The magistrate referred to the

applicability of the minimum sentence of life imprisonment in this matter because rape was regarded as one of the most serious offences. She also referred to enquiring whether there are exceptional circumstances which exist in order for the court to deviate from imposing the prescribed minimum sentence.

[17] In ***Kgosimore v the State*** **1999 (2) SACR 238 (SCA)** at paragraph 10, the court restated that;

> *"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry.* (Compare *S v Pieters* 1987 (3) SA 717 (A) at 727G - I.) *Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so."*

[18] The magistrate did not expressly find that the evidence proved that the appellant and Ndumiso raped the complainant in furtherance of a common purpose. Nevertheless, the evidence proved such circumstances, in my view.

[19] This is not the typical case of gang rape, where all perpetrators are taking turns, one in the presence of others. This is probably what informs Mr Geldenhuys's argument in paragraph 14 above, that the state failed to prove that the rapes were committed in furtherance of a common purpose. Section 51 (1) Part 1 of schedule 2 provides:

"Notwithstanding any other law, but subject to subsection (3) and (6) a Regional or a High Court sentence a person it has convicted of an offence referred to Part 1 of Schedule 2 to imprisonment for life. Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 - (a) when committed

(i) ……
(ii) by more than one person, where such persons acted in the execution or furtherance of common purpose or conspiracy".

In ***S v Kimberley*** **2005 (2) SACR 663 (SCA)** at 668, Zulman JA dealt with the situations where rapes contemplated in paragraph (a)(ii) occur. At paragraphs 9 and 10, the learned Judge stated that the 'mischief' which the Legislature sought to deal with was the situation where a woman was subjected to multiple rapes either by one person or by any co-perpetrator or accomplice. He clarified that the paragraph requires that the victim be raped more than once. It is not necessary go into the degrees of participation for the purposes of interpreting the sections.

[20] I would therefore agree with counsel for the respondent, Ndumiso and the appellant both knew that the complainant was going to be raped. The appellant found the complainant already compromised, half robed. She was

resisting and screaming. He assaulted her further, completed undressing her and raped her. I do not attach any significance to the fact that neither of the perpetrators sat in to watch the rape by another. Ndumiso, then a 14 year old, walked out as soon as the appellant, who was the much older one, in any case, violently approached the complainant and, in the magistrate's words "took over". The moment the appellant finished raping the complainant, Ndumiso conveniently re-appeared, and raped the complainant. In my view, he was always waiting for the appellant to finish. I cannot agree with counsel for the respondent more that this was a calculated, coordinated mischief of rapes by more than one person which fits in what is envisaged in Part 1 Schedule 2, paragraph (a)(ii) of the Act.

[21] The magistrate misdirected herself in her reasoning with regard to sentence. In deciding whether circumstances justifying a departure from imposing the prescribed minimum sentence of life imprisonment existed, the magistrate seemingly looked for exceptional circumstances. In ***S v Malgas*** **2001 (1) SACR 469 (SCA) at paragraph 25 G,** it was held that the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling ") and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained. I therefore have to reconsider the issue of whether there are substantial and compelling circumstances justifying a deviation from the imposition of life imprisonment.

[22] The appellant was 35 years old, and a first offender. He had no permanent employment. He was diagnosed with HIV virus soon after the commission of the offence and became very sick such that the trial then continued against Ndumiso only. As regards the circumstances of the offence, it was perpetrated very violently. The complainant was a 17 year old virgin.

They raped her without putting a condom on. She was negatively affected by the rape and she failed grades 11 and 12. She still cried when she testified in court, nine years later. According to the victim impact report, she still suffers greatly from the effects of the rape. She has difficulty in trusting people, especially men. Her negative emotions are triggered by even listening to rape related topics or shows. She has not told her current boyfriend of 5 years, who is the father of her child, about the rape for fear of being judged.

[23] I am alive to the warning in ***S v Malgas,*** supra, that I am not to depart from imposing the minimum sentence for flimsy reasons. I nevertheless agree with counsel for the appellant that the personal circumstances of the appellant, do constitute substantial and compelling circumstances to deviate from imposing the minimum sentence of life imprisonment. Even though it was not the fault of the state that the trial did not proceed from 2004, it was hanging over the head of the appellant. This was his first offence and he did not commit any further offences in that period of 9 years. When I balance all the factors, I am of the view that when taking into account the appellant's circumstances, cumulatively, they do amount to substantial and compelling circumstances justifying the departure from imposing the minimum sentence. The appeal against sentence therefore, will succeed.

[24] In the result,

1. The appeal against conviction is hereby dismissed.

2. The appeal against sentence succeeds. The sentence of life imprisonment is hereby set aside and substituted with a sentence of 25 years imprisonment ante dated to 15 May 2015.

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B Majiki

Judge of the High Court

I agree, it is so ordered.

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J M Roberson

Judge of the High Court

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