IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA & R 128/2018

In the matter between:

VUMILE NDAMASE **First Appellant**

SIMPHIWE BHENTELE **Second Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

Bloem J.

[1] The appellants were charged in the regional court at Cradock with kidnapping, rape and robbery. They pleaded not guilty but were convicted of kidnapping and rape. They were acquitted of robbery but the first appellant was convicted of the lesser offence of theft. They were each sentenced to three years' imprisonment on the count of kidnapping and imprisonment for life on the count of rape. The first appellant was sentenced to one year imprisonment on the count of theft. They now appeal in terms of section 309 (1) (a) of the Criminal Procedure Act[1] against the convictions of rape and sentence of imprisonment for life.

[2] The allegations against the appellants were that on or about 23 February 2013 and at

[1] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Steynsburg they unlawfully and intentionally deprived GR (the complainant) of her freedom by forcibly taking her into a house belonging to the first appellant's mother (the house) and locking her in without her consent, they raped her several times while she was inside the house and they robbed her of her cellphone. The appellants denied all the allegations against them, each one claiming an alibi.

[3] The complainant testified that during the course of Saturday, 23 February 2013 she consumed four glasses of sherry. At about 19h00 she went to look for her boyfriend. While walking in an alley she became aware of people walking behind her. She looked backwards and saw three persons. They eventually caught up with her and tripped her from behind as a result of which she fell. They assaulted her by kicking her and hitting her with clenched fists, a belt and an iron rod. She knew the one as Player, who turned out to be Abongile Africa, and the other as Vumile, the first appellant. Later during her evidence she referred to the third person as Simphiwe. While they were dragging her she cried aloud but a cloth was put into her mouth. When they were inside the house they instructed her to undress. When she refused to undress they assaulted her again. They placed her on a sponge mattress and undressed her. Abongile was the first to have vaginal sexual intercourse with her on three occasions. While he was having sexual intercourse with her the other two were smoking dagga. The first appellant had sexual intercourse with her after Abongile, also on three occasions. Simphiwe then had vaginal intercourse with her on four occasions. In the morning they took her cellphone which was on the floor, locked her inside the house and said that they would return. She knocked at one of the windows from inside the house. She managed to attract the attention of one lady to whom she made a request that the police be called. The police arrived and she told them what had happened to

her. The police went away and returned with three men who she identified as her assailants. The police took her to the hospital where she was examined by Dr Hurribunce who caused her to be admitted for four days.

[4] Rose Maragi has been residing in Greenfields, Steynsburg for more than ten years before the incident. She testified that on the morning of Sunday, 24 February 2013 she was at home when she heard someone crying for help. She walked towards the house which is situated in front of hers. The person inside the house reported to her, through a window, that she had been assaulted, raped and locked up by three men who said that they would return. She noticed that the complainant had a black eye and her face was swollen. She went to a police official's house to arrange for the police to be called. The police arrived and the complainant made a report to them.

[5] Abongile testified that on the Saturday evening in question he and the two appellants met the complainant at a local tavern, Darkie's Tavern. He and the second appellant were friends. The complainant said that she was going to her boyfriend or husband. As they were walking the first appellant hit her with a belt and he (Abongile) kicked her. They took her to the house. He had the key and unlocked the door. He was the first to have sexual intercourse with her followed by the first appellant who had sexual intercourse with her on three occasions and then the second appellant who had sexual intercourse with her on three occasions. After she had been raped they locked her inside the house and left at about 05h00 on the following day. The police arrested them at about 09h00 and took them to the house where the complainant was still locked up. He was subsequently charged with the rape of the complainant, pleaded

guilty, was convicted of rape and sentenced to 12 years' imprisonment.

[6] Constable Andiswe Goyixila testified that on the morning of 24 February 2013 she and some of her colleagues were called out to Greenfields. When they arrived at the house she noticed a crowd of people standing outside. The complainant, who was still locked inside the house, informed them that she had been assaulted and raped by three men who thereafter locked her inside the house. The complainant told them that she knew them but did not remember their names. Some of her colleagues went to collect Abongile who opened the house. The complainant then identified Abongile as one of the persons who had raped her when he opened the door. He denied any involvement. The complainant also pointed at the spot in the house where she had been raped. Abongile said that the complainant had been raped by two men who normally kept company with one Pro. The police looked for and found Pro. He left with a policeman to look for the two men. They returned with the first appellant. The complainant pointed at the first appellant as one of those who had raped her.

[7] Constable Goyixila testified that she took the complainant to hospital because her one eye was swollen and she had an injury on her head. While they were waiting for the doctor at the hospital she took a statement from the complainant. By agreement, the correctness of the contents of the medical report of Dr Hurribunce who examined the complainant at the Steynsburg Hospital at about 12h30 on 24 February 2013 was admitted as admissible evidence. The appellants also admitted the correctness of a DNA report which revealed that the second appellant's sperm was found in the complainant's vagina. That concluded the state's case.

[8] The first appellant testified that on the Saturday in question he was at work until he knocked off between 5 and 6 pm. Later that evening he went to Darkie's Tavern with his friends, namely Throw, Bonga and Thandisizwe. They remained at the tavern until it closed shortly after midnight whereafter he went home. He did not see the second appellant, Abongile or the complainant at the tavern. He went to sleep at his brother's place. Early the following morning the police arrived where he was sleeping. They took him to the house. When the police told him what the allegations were against him he denied that he had raped the complainant or taken her cellphone.

[9] The second appellant testified that he was with a friend at Darkie's Tavern between 6pm and about midnight. He did not see the first appellant, Abongile or the complainant at the tavern. He was arrested at another tavern during the course of the following day. He denied that he had raped the complainant. He also denied, much to the surprise of his attorney, that one Sr Kalipa took a swab from him for purposes of DNA analysis.

[10] Simon Dyantyi is the first appellant's friend. He testified that he and the first appellant worked until 5pm on the Saturday in question. Later that evening they went to Darkie's Tavern where they enjoyed themselves until approximately midnight. When he left the first appellant was still at the tavern, also in the process of leaving because the tavern was closing. While at the tavern he did not see the complainant, Abongile or the second appellant. When he was asked in evidence-in-chief why he did not go to the police when he learned that the first appellant had been arrested on a charge of

rape to explain that the first appellant was with him during that evening, he replied that he could not "*because I do not know whether he did it or he did not do it.*"

[11] Because the second appellant disputed that a swab was taken from him, the state applied to reopen its case. The magistrate granted that unopposed application. Warrant officer Theunsina Labuschagne, the investigating officer, testified that on 16 July 2013 she took the second appellant to hospital where Sr Kalipa took a buccal swab from him, sealed it with a reference number and handed it to her. When she arrived at her office she packed the swab, sealed it in a forensic bag which also had a serial number and sent it to the laboratory. When she was cross-examined it was put to her that the second appellant:

> *"… will then admit, he says he remembers that you took him to the hospital. He doesn't know the nurse but he remembers that something was put in his mouth. The buccal sample was taken from inside his mouth. Is that correct? --- Yes, that is correct Your Worship".*

[12] The magistrate convicted the appellants of rape because, in his view, the complainant's version that she had been raped by them and Abongile was corroborated by independent and objective facts, for example that Ms Maragi testified that when she investigated the cry for help, the complainant informed her that she had been raped by three men, that she made the same report to the police, that Abongile, although a co-perpetrator, admitted that the three of them had raped her and the second appellant's sperm was found on the complainant's private parts.

[13] The main issue before the magistrate was whether the state proved beyond reasonable doubt that the appellants were the complainant's rapists. Identification was accordingly the only issue. Evidence of identification is approached by our courts with some caution. In *S v Mthetwa*[2] Holmes JA said that:

> *"It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one against the other, in the light of the totality of the evidence, and the probabilities."*

[14] Mr Geldenhuys, counsel for the appellants, submitted that the following factors detracted from the reliability of the complainant's identification of the appellants as her rapists: that she was under the influence of alcohol during the incident; that it was dark inside the house where she was raped, the only illumination coming from her cellphone; that she endured a traumatic and violent assault which must have affected her powers of observation; that there was a real danger of suggestibility as the appellants were shown to her by the police after the incident; and she contradicted her statement to the police regarding whether or not she gave the names of the perpetrators to the police or whether or not she could identify them by their clothing.

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[2] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

[15] It was furthermore submitted that Abongile had a clear motive to falsely implicate the appellants as he had made a deal with the state to plead guilty and testify against the appellants in return for a lesser sentence. It was submitted that Abongile was not a credible witness because he tried to place himself in the best possible light regarding his role in the incident, going so far as to claim that he had been forced by the first appellant to rape the complainant. The submission was that the appeal should succeed because the state failed to prove its case against the appellants beyond reasonable doubt.

[16] Mr Henning, counsel for the state, submitted that a reading of the judgment showed that the magistrate was aware of the caution required when considering evidence of identification and the need for corroboration and that there was ample corroboration for the complainant's evidence.

[17] A reading of the record suggests that the complainant's evidence relevant to the names of the persons who raped her was unclear. On one occasion she indicated that, although she knew the appellants, she did not know their names and on another occasion she testified that she knew their names. She testified that she was not under the influence of alcohol at the time of the incident. Her evidence must nevertheless be treated with caution because of her intake of alcohol and Abongile's evidence that she was under the influence of alcohol. Her evidence requires corroboration to lend reliability to it. She testified that she knew the first appellant before the incident because her sister was in a relationship with his brother and they accordingly saw each other from time to time. The first appellant's evidence was to the same effect in that regard. Furthermore Ms Maragi testified that, when she met

the complainant that morning, she reported to her that she had been raped by three men. The same report was made to the police. The complainant's evidence that she had been raped by three men was not disputed.

[18] Furthermore, Abongile testified that he and the appellants were the persons who had raped the complainant. Abongile's evidence should be also be treated with caution. The fact that he pleaded guilty that he and other two men raped the complainant serves as corroboration for the complainant's evidence that she had been raped by three men. It is difficult to conceive what advantage Abongile could obtain by testifying against his co-perpetrators after he had been convicted and sentenced for the same offence. The second appellant was unable to explain the presence of his sperm in the complainant's private parts. It serves not only as confirmation that he and the complainant had sexual intercourse before she was examined by Dr Hurribunce, but provides an indirect guarantee on the reliability of the complainant's identification of the appellants and Abongile. Mr Dyantyi's evidence did not corroborate the first appellant's alibi. He uninvitingly conceded that the first appellant could have raped the complainant. That is so because they went their separate ways when they left the tavern that evening.

[19] The appellants did not appeal against their conviction of kidnapping. The facts underlying that conviction are that on the evening in question they deprived the complainant of her freedom by forcefully taking her to the house and locked her in without her consent. Those findings have not been challenged on appeal and accordingly stand. The above factors make the complainant's identification of the

appellants and Abongile as the persons who raped her reliable. In all the circumstances, the magistrate correctly found that the state proved beyond reasonable doubt that the appellant's raped the complainant. Their appeal against conviction on the count of rape should accordingly be dismissed.

[20] The magistrate sentenced the appellants to imprisonment for life because the complainant was raped more than once by more than one person. That is a competent sentence in terms of section 51 (1) of the Criminal Law Amendment Act[3]. If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed minimum sentence, it may impose such lesser sentence.

[21] It was submitted on behalf of the appellants that the magistrate erred when he found that substantial and compelling circumstances were not in existence. In respect of the first appellant the magistrate should have taken into account, so the submission went, that he only had one previous conviction in respect of an assault with intent to do grievous bodily harm which was committed in 2005 for which he received a non-custodial sentence, that his father died while he was a teenager which left him predisposed to behavioural problems, that he dropped out of school during grade 10 for financial reasons, that he was gainfully employed and helped to support his mother, that he had three children, one of whom he used to support and that he has a history of substance abuse. The second appellant's personal circumstances were that he had no previous convictions, his biological parents did not play a role in his upbringing and

[3] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997). In this regard see Part 1 of Schedule 2 of the aforesaid Act.

he experienced problems with his family, he had a history of substance abuse and was under the influence of liquor during the incident, he dropped out of school during grade 10 and he was gainfully employed and assisted to support his family. The submission was that if the appellants' personal circumstances were taken into account holistically, they constituted substantial and compelling circumstances.

[22] Rape is a serious offence. It has been described as a humiliating and degrading offence wherein the offender brutally invades the privacy, dignity and person of his victim.[4] It has also been described as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.[5] The appellants violated the complainant's bodily integrity against her will. She will in all probability live with the thought of having been violated for the rest of her life. Rape is very prevalent within the area of this court.

[23] The personal circumstances of the appellants must take the back seat when it is balanced against the brutal nature of the rape against a defenceless woman and the indignation of members of society towards an offence of this nature. In my view no substantial and compelling circumstances exist to justify the imposition of a lesser sentence than the minimum prescribed sentence. A sentence of imprisonment for life would fit the appellants, the brutal nature of the rape as well as the interests of the community.

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[4] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b.
[5] *S v Vilakazi* 2009 (1) SACR 552 (SCA) at 555h and *S v SMM* 2013 (2) SACR 292 (SCA) at 299a-b.

[24] In the result, it is ordered that the appellants' appeal against conviction on the count of rape and sentence of imprisonment for life in respect thereof be and is hereby dismissed.

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G H BLOEM
Judge of the High Court

Jaji J,

I agree

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N P JAJI
Judge of the High Court

For the appellants:	Adv D P Geldenhuys of Legal Aid South Africa, Grahamstown.
For the state:	Adv N Henning of the office of the Director of Public Prosecutions, Grahamstown.
Date of hearing:	13 February 2019.
Date of delivery of the judgment:	19 February 2019.