IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A86/2016

In the matter between:

NTLAKANISO MADUNA 1st Appellant

MPHO MOSES KHOTLE 2nd Appellant

and

THE STATE Respondent

CORAM: MBHELE, J, BOKWA, AJ *et* CHESIWE, AJ

HEARD ON: 14 November 2016

JUDGMENT BY: MBHELE, J

DELIVERED ON: 23 FEBRUARY 2017

[1] This is an Appeal against conviction and sentence. The two appellants were convicted of rape by a Regional Court sitting at Bloemfontein on 25th August 2015 and were each sentenced to life imprisonment on 25 August 2015. Appellants have an automatic right to appeal.

[2] The appellants feel aggrieved by both conviction and sentence and now approach

this court on appeal against the same.

[3] In the notice of appeal, heads of argument as well as arguments before us the appellants assail the conviction on the grounds that the Regional Magistrate erred in finding that the complainant as a single witness satisfied the requirements of section 208 of the Criminal Procedure Act 51 of 1977, that the court erred in finding that the medical evidence is not indicative of consensual intercourse and that the vehicle movement report is not conclusive evidence despite the findings thereof being put to the complainant in cross examination.

[4] The facts that led to the appellants' conviction were that on 29 August 2012 the complainant, a female detainee at Kroonstad prison, was transported by the appellants from Botshabelo Court to Kroonstad correctional centre with a marked police van. The first appellant was the driver of the relevant vehicle. When she left Botshabelo court she was on the back of the police van and just after the vehicle left Botshabelo she was asked to join the appellants in the front seat. She sat between the appellants up until a few kilometres before Windburg where the vehicle stopped for her and the second appellant to discharge urine. The vehicle veered off the N1 to the side road leading to Brandfort. On her way back to the vehicle after urinating, she found the doors at the back of the van open and the first appellant standing at the door directing her to go to the back of the van. As soon as she jumped into the back of the van she was joined by the first appellant and the second appellant locked the door from outside. The first appellant took out a blanket which was in her bag, spread it on the floor inside the van and ordered her to lie thereon. He strangled her, took off her denim pants, spread her legs and penetrated her vaginally without he·r consent. He tried to wear a condom before penetrating but struggled due to his huge penis, he then penetrated her without a

condom. The first appellant called the second appellant and asked him to increase speed. After the second appellant finished having sex with her he offered her a blue cloth to wipe herself with which she did not use and opted for a piece of toilet paper. The first appellant called the second appellant and told him to stop the vehicle so they could go back to the front. The first appellant took over as the driver while the complainant sat in front between the appellants. The vehicle stopped at Ventersburg filling station where she was left alone while the appellants went to the toilet. The first appellant threatened to kill her should she divulge that he raped her. He gave her his cell phone numbers and told her to call him should she decide to lay charges. The appellants handed her over to the authorities at Kroonstad prison. On her arrival at Kroonstad prison, she reported the matter to a nurse who did observations on her before she could be booked in. She was referred to hospital on the same day where she was examined by Dr. Thagane and DNA samples were obtained.

[5] Nomvula Elizabeth Melamu, a professional nurse at the Kroonstad Correctional facility, testified to the effect that she was called from home to do a routine examination on the complainant as it was the normal procedure that all inmates must be examined before being admitted into the facility. During examination she enquired from the complainant if she was abused in any manner. She responded that she was raped by a police officer who transported her from Botshabelo Court to Kroonstad prison. She immediately referred the complainant to Boitumelo hospital for further examination. When she observed her she was calm.

[6] Dr. Gungunyane William Thakgane examined the complainant on 29th August 2012. He found no evidence of forceful penetration but did not rule out the possibility of forceful penetration. The complainant's age, number of deliveries are factors that may have

influenced the findings. He opined that if the complainant was raped by a man with a huge penis, in a moving vehicle one would expect to find tears on the posterior fourchette or vagina. One would also expect to see bruises on her body if she fought back while the vehicle was moving. There was no evidence to support the complainant's version that she was strangled by the first appellant.

[7] Arthur Paulus Pearce Mokoena, a forensic nurse at Botshabelo Hospital, collected blood samples from the first appellant. He was accompanied by Nankie Motloung who used to be a senior investigator at the Independent Police Investigation Directorate. He received a sexual offences Kit from Motloung and upon its receipt he noticed that the kit had expired in 2008. He informed Motloung that she would need to replace the kit but she refused and ordered him to proceed anyway. He drew blood from the first appellant and sealed the kit accordingly.

[8] Nankie Motloung, an erstwhile senior investigator at **IPID** confirmed that she took first appellant to Botshabelo hospital to obtain his DNA samples. Mokoena told him that the kit she brought was no longer in use but he would assist him because it had not expired. She denied that the kit had expired.

[9] Elisa Machitje a field worker at the Local Criminal Record Centre at the SAPS arrived at Botshabelo Police Station on 30 August at around 15h49. She was informed by Motloung that a rape took place in the police van with registration numbers [B...]**.** Motloung, Mokgobo and Colonel Xele opened the van and she noticed a condom, a piece of toilet paper and some Shoprite paper on the floor of the van. She took pictures and collected all items she found on the back of the van. She sealed them in a bag and forwarded them to Forensic Science Laboratory on 12 September 2012.

[10] Mathukudu Samuel Mashegoane is a Captain at the SAPS and stationed at the

biology section of the Forensic Science Laboratory in Pretoria. He compared the samples obtained from the complainant's vestibule perineum swabs and panty with the reference samples obtained from the first appellant. The DNA results obtained from the complainant's vestibule perineum swab and panty matched the DNA results obtained from the first appellant. When asked about the impact of an expired kit, his response was it may affect the quality of the results. He understands that there is a reason the kits have a shelf life but not certain of the effects of the usage of the expired kit. In the current matter the DNA was obtained and he was certain that the expired kit did not affect the quality of the results.

[11] The appellants simply denied that the first appellant ever had sexual intercourse with the complainant. Their version was that their vehicle never stopped on the N1 for the complainant and the second appellant to urinate. When they left Botshabelo with the complainant she was sitting in front with them because the canvass covering the windows at the back were torn and the complainant would freeze if she were to sit at the back. They stopped at Shell garage in Bloemfontein, Verkeerdevlei plaza and Ventersburg. Their last stop was Kroonstad prison where they handed the complainant to prison authorities. The first appellant denied ever threatening to kill the complainant and have her children raped should she report the rape. He was insistent that the complainant had previously accused him of being a party to ID fraud.

[12] Mr. Vorster on behalf of the appellants submitted that the trial court was correct in finding that sexual intercourse did occur between the complainant and the first appellant but erred in finding that the complainant 's narration of the events was correct. He, painstakingly, contended that the rejection of the vehicle movement report was without basis as it was thoroughly canvassed during cross examination of the complainant. He,

further contended that the complainant's version is not supported by the medical report and should have been rejected by the trial court. He advanced a new argument that was not raised during trial. He argues that the state failed to prove that the sexual intercourse was without consent. He relied on an unreported judgment of the Eastern Cape High Court in **Makhaya Ntini v the State** where Jansen, J found as follows:

'the complainant's own evidence, even if accepted, puts in doubt both the existence of lack of consent and question of *mens rea' .*

[13] Mr. Botha, on behalf of the respondent, contended that both the complainant and appellants' version create nor room for consensual intercourse. He further contended that the 2nd appellant was aware of the first appellant's conduct and protected him.

[14] The trial court rejected the appellants' version as not reasonably possibly true. The court below, further, found that the medical evidence does not negate the complainant's version that she was forcefully penetrated. The court below, further, found that the contradictions in the complainant's version are immaterial when one looks at the evidence in totality.

[15] It is trite that factual findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.)

[16] In the current matter, the complainant's evidence shows that she did not consent to the sexual intercourse. The complainant was in custody of the appellants who held positions of authority. The first appellant threatened to shoot her if she reported the matter to anyone and make it look like she was shot while trying to escape. I have no doubt that

the trial court correctly found that the first appellant penetrated the complainant vaginally with his penis without her consent.

[17] The trial court found that the second appellant acted in pursuance of the common purpose. In **R v Garnsworthy 1923 WLD** 17 the doctrine of common purpose was defined with reference to the common purpose to achieve a shared unlawful purpose. The court held as follows:

'Where two or more persons combine in an undertaking for an illegal purpose, each of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known , would be a probable result of their endeavouring to achieve their object.'

[18] It is now settled that an accused can be convicted of murder in terms of the doctrine of common purpose if he had the intention (direct intention) to kill. See **S V Malinga 1963 (1) SA 692 (A) at 694** where the following was held:

'Now the liability of a *socius criminis* is not vicarious but is based on his *mens rea.* The test is whether he foresaw (not merely ought to have foreseen) the possibility that his *socius* would commit the act in question in the prosecution of their common purpose.'

[19] In the current matter, it is important to establish whether the State proved beyond reasonable doubt that the second appellant did foresee that the first appellant would rape the complainant. Rape is an offence that requires intention. There is no evidence to show that the second appellant knew that when the first appellant got into the back of the police van with the complainant the end result would be rape. The fact that the second appellant remarked that the complainant was not a child and she could clearly see the reason the first appellant wanted to be alone with her in the back of the van is not sufficient

enough to prove that he knew that the first appellant's action would result in the rape of the complainant. The complainant could not say with certainty that she did report the rape to the second appellant.

[20] The mere presence at the scene of crime is not sufficient to prove liability. See (**S v Mgedezi and Others 1989 (1) SA 687 (A)**) where the following was said:

'Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person. A common purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former'.

[21] In line of the above I am of the view that the trial court misdirected itself when it found that the second appellant assisted the first appellant in the commission of rape. The second appellant's appeal against conviction and sentence must succeed.

[22] We have to take into account the first appellant's personal circumstances when considering his sentence.

The appellant was 47 years of age at the time of sentencing. He is married with 3 children. Their ages were 21, 16 and 9 years respectively. His wife is a professional nurse at Botshabelo Hospital. His children are still dependent on him. He was employed as a police officer and he got dismissed as a result of this offence. He committed a very serious offence. As pointed out by the trial court, he took advantage of the complainant who was a detainee and had no means to run away and escape the ordeal. She was in a dilemma and had to endure whatever treatment was meted out to her by those entrusted with her safety. What makes this offence even more serious is that the police officer

who was entrusted with the responsibility to guard the complainant violated her and used his position and authority as a tool to accomplish his knaveries.

[23] The first appellant was sentenced to life imprisonment. The trial court found no substantial and compelling circumstances to justify a departure from the prescribed sentence. The first appellant was sentenced in terms of Section 51 (1) of the Criminal Law amendment Act 105 of 1997.

[24] Sentencing is pre- eminently in the discretion of a trial court. The sentence can only be interfered with if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate.

(See **S v Pieters** 1987 (3) SA 717 of 727)

[25] The minimum sentence of 10 years imprisonment is applicable in this matter.

[26] Mr. Vaster submits that there are substantial and compelling circumstances justifying a departure from the minimum sentence prescribed by the Act. The test for existence of substantial and compelling circumstances warranting deviation from the prescribed minimum sentence, is whether or not the cumulative effect of mitigating factors on the gravity of the offence, the general aggravating factors and the interest of community render the relevant prescribed sentence unjust. (See **S v Malgas** 2001 (1) SACR 469 SCA.

[27] When weighing up the mitigating factors against the aggravating circumstances, this matter as well as the interest of community, I am of the view, that there is no justifying cause to deviate from the prescribed minimum sentence

ORDER

[28] In view of the above, I make the following order:

- Appeal against conviction fails in respect of the first appellant;
- Conviction is confirmed in respect of the first appellant;
- Appeal against sentence succeeds in respect of the first appellant;
- The first appellant's sentence is set aside and, in its place and stead, the following order is made;
- The first appellant is sentenced to 10 years imprisonment;
- Appeal against conviction and sentence succeeds in respect of the second appellant;
- Conviction and sentence are set aside in respect of the second appellant;
- The first appellant's sentence is antedated to 20 August 2015.

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N.M. MBHELE, J

I concur

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I.R.O.BOKWA, AJ

I concur

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S. CHESIWE, AJ

On behalf of applicant: Mr. VORSTER

CALLIS INC.

184 NELSON MANDELA DRIVE

PROVEDEAMUS BUILDING

3RD FLOOR

WESTDENE

BLOEMFONTEIN

JA CALLIS/csl/C5AK001

On behalf of respondent: Adv. BOTHA

Instructed by:

Office of the Director: Public Prosecutions

BLOEMFONTEIN