IN THE HIGH COURT OF SOUTH AFRICA, FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No.: A167/2017

In the appeal between:

MOSALA JOHN MOTEKA Appellant 1

THATO NEELS Appellant 2

and

THE STATE Respondent

CORAM: REINDERS, J *et* VOGES, AJ

JUDGEMENT: REINDERS, J

HEARD ON: 26 AUGUST 2019

DELIVERED ON: 20 SEPTEMBER 2019

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[1] The appellants, who enjoyed legal representation, were arraigned before the Regional Court on two charges, to wit:

Count 1: Rape, it being alleged that on or about 14 May 2011 they unlawfully and intentionally committed an act of sexual penetration by penetrating the vagina and anus of the complainant with their penises without her consent.

Count 2: Robbery with aggravating circumstances by alleging that they unlawfully and intentionally assaulted the complainant and took with force her cellphone and R150 cash, the aggravating circumstances being that she was threatened with a gun and knife.

[2] Appellants pleaded not guilty to both charges but were convicted on 14 August 2013. On 22 August 2013 they were sentenced to life imprisonment on the charge of rape and 15 years imprisonment on the charge of robbery with aggravating circumstances. Leave to appeal was refused by the trial court but granted on petition by this court in respect of both the convictions and sentences.

[3] Ms Kruger appeared on behalf of the appellants. Heads of argument were drafted by Mr Reyneke. In respect of both the convictions and sentences no further arguments were relied upon in this court why the magistrate erred.

[3] The State supports both the convictions and sentences. Mr Khetsi contended that the trial court did not misdirect itself.

[4] The State called four witnesses to prove its case. The crux of the evidence of the prosecution, as accepted by the trial court, entailed the following:

> The complainant testified that she was walking from her house in [….] to meet a friend. On her way she was accosted by three males. She was grabbed by her neck from behind by second appellant. First appellant grabbed her by her hand. Second Appellant held a knife against her neck and threatened to use it if she made a noise. First appellant removed her cell phone from her pocket as well as cash and her earrings. Second appellant suggested that she should be raped. She was taken to an open veld where she was made to kneel and raped by Second appellant, vaginally en thereafter anally. Hereafter First appellant turned her on her back and raped her. The third male, known to her as T[….] K[….], was present all throughout but did not participate in the commission of the crimes in any way. There were no people in the vicinity and she was crying during the ordeal. When the men were done she ran off and met with two persons who stopped a police vehicle that was patrolling the vicinity. She immediately made a report on what had happened to the female officer in the vehicle. Hereafter she went for a medical examination. Only her cell phone was later recovered.

Mr K[….] confirmed the testimony of the complainant in essence. He testified that he refrained from assisting her as he feared complainant or himself being stabbed. He pointed out first appellant's residence to the police. He was discharged from prosecution by the trial court in terms of the provisions of Section 204 of the Criminal Procedure Act 51 of 1977.

Constable Nomfasa Basitetse was the female police officer to whom the complainant directly after the incident made a report. She confirmed the report and testified that the complainant was crying and full of grass from her hair down to her shoes.

Elizabeth Mokoena is a professional nurse. She examined the complainant and filled out the J88 medico-legal report which was handed in as an exhibit. One of the more important findings was that fresh multiple tears were recorded on and surrounding the orifice of the complainant's anus, with the conclusion of anal penetration.

[5] Both appellants testified. They admitted having had sexual intercourse with the complainant on the night in question. They admitted having been in the presence of Mr K[….]. According to them Mr K[….] informed them that complainant was a prostitute. Second appellant negotiated a fee of R 150 in respect of both himself and First Appellant to have sexual intercourse with the complainant. They went to the residence of second appellant where both had vaginal intercourse with

her on a mat that was placed on the dirt floor. They deny that any one of them anally penetrated the complainant or at any stage threatened her with a knife. When they were done they had insufficient money to pay her. She was given R 50 and would later return to collect the balance. She forgot her cellphone and first appellant decided to keep the phone until she returns. The next morning the police came to first appellant and arrested him for rape and robbery and the phone was found in his possession. Second appellant likewise testified that he was arrested the next morning by the police and on investigation he showed the police a panga.

[6] The trial court accepted the evidence of Constable Basitetse and Sister Mokoena. I find no fault therewith and the appellants could not dispute their evidence. As to the credibility of the complainant and Mr K[….] they were found to be credible and reliable witnesses. The magistrate accepted their evidence and amongst others, found corroboration for the complainant's evidence in the evidence of Mr K[….]. Further corroboration for complainant's evidence was found in the first report witness and the evidence of Sister Mokoena.

The magistrate considered and dealt with the aspect of Mr K[….] having been influenced whilst in custody, to give the evidence before court as he did. The court a quo was satisfied with the honesty of Mr K[….]. The magistrate considered and dealt with the possibility that Mr K[….] have been influenced whilst in custody, to give the evidence before court as he did.

The court a quo was satisfied that Mr K[….] did not to fabricate his testimony.

The appellants' evidence did not impress the magistrate. The magistrate referred to and thoroughly alluded to all the discrepancies in their evidence, contradictions and their evasiveness in answering questions. On a conspectus of all the evidence the magistrate found their versions to be improbable and rejected their versions.

[7] It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by credibility findings thereof, unless it is convinced that such findings are clearly incorrect. In order to succeed on appeal the appellants must convince us, on adequate grounds, that the trial court was wrong in accepting the evidence of the state.

It is only in exceptional cases that an appeal court will be entitled to interfere with a trial court's evaluation of oral testimony bearing in mind the advantage which the magistrate had of seeing, hearing and appraising witnesses.

See: *S v Francis* 1991 (1) SACR 198 (A) at 204c-e.
J v S [1998] 2 All SA 267 (A) at 271c.

[8] Having considered the magistrate's findings and reasons I am not convinced that the magistrate misdirected herself in any manner. On the contrary, she made no factual misdirections, considered all the relevant factors in evaluating the evidence

and came to the correct conclusions. She rejected the versions of the appellants for sound reasons in respect of both the charges of rape and robbery with aggravating circumstances. I agree with her findings. Although criticism can be levelled at the magistrate for her finding that the complainant was raped by more than one person and also raped more than once (with reference to the penetration of complainant's vagina and anus by second appellant), the provisions of Sec 51(1) of Act 105 of 1997 read with Part 1 of Schedule II is applicable in respect of complainant being raped by more than one person.

Multiple penetrations do not constitute multiple rapes.
See: *S v Blaauw* 1999 (2) SACR 295 (W) at 300
"…mere and repeated acts of penetration cannot, without more, in my mind be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim, withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice."

In casu complainant was specific that second appellant "…raped me for a while. After a while he took it out from the vagina and then inserted it in my anal (*sic)*…"

The evidence of the rape by two persons however triggered the provisions of Sec 51(1) and the incorrect legal conclusion by the magistrate becomes academic.

It follows that the appeals against the convictions stands to be dismissed.

AD SENTENCE

[9] Having found that the convictions were in order, it must be determined if the sentences imposed are just, regard being had to the cumulative impact of mitigating and aggravating factors inclusive of the interests of society. It is trite that the powers of a court of appeal to interfere with the sentence imposed, are limited insofar as it can only interfere where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all.

See: *S v Pieters* 1987(3) SA 717 (A); and
S v Hewitt 2017(1) SACR 309 (SCA).

[10] The trial court had regard to both appellant's personal circumstances. They are both first offenders, spend 22 months in custody awaiting trial and each one have a minor child. They displayed no remorse. First appellant is 19 years old and second appellant is 20 years old. The court dealt with the age of the first appellant and concluded that his actions did not display that he was acting immaturely. Although admitting that no evidence was lead in the court a quo regarding the youthfulness of both appellants, we were requested by counsel for appellants (with reference to several case law) to find same to be a factor warranting a deviation from the prescribed sentence of life imprisonment. In my view the trial court was correct in finding, on the evidence before her which included the brutal way in which

the complainant was robbed and raped, that the ages of the appellants did not cause her to deviate from the minimum prescribed sentences in respect of the convictions on both counts.

[11] The magistrate in following the guidelines in *S v Malgas* 2001 (1) SACR 469 (SCA) did not find any substantial and compelling circumstances in respect of the rape charges and invoked the prescribed minimum sentence of life imprisonment as prescribed in Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2. The same finding was made as to the robbery with aggravating circumstances as described in Part II of Schedule 2, and she invoked the prescribed sentences of 15 years imprisonment.

[12] Complainant testified in aggravation of sentence that she suffered emotional trauma as a result of the incident and felt humiliated and ashamed. The trial court noticed that she was very emotional and cried during her testimony in this regard.

[13] In stressing the seriousness of rape and indeed the facts in casu, the trial court referred to *S v Chapman* 1997 (3) SA 341 (SCA). The magistrate alluded to the interest of the community at large to be protected by rapists and the courts' duty to send out a clear message of non-tolerance in its sentence.

[14] I find no fault with the reasoning of the magistrate and I am likewise satisfied that no substantial and compelling circumstances exists which required consideration of different sentences than those prescribed by the legislature.

[15] I accordingly make the following order:

The appeals of both the appellants against their convictions and sentences are dismissed.

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C. REINDERS, J

I concur.

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M. VOGES, AJ

On behalf of the appellants: Ms S Kruger
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv R Khetsi
Instructed by:
Director: Public Prosecutions

BLOEMFONTEIN