REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

DATE SIGNATURE

Case Number: **A106/2018**

In the matter between:

PATRICK SHANNON DANIELS Appellant

And

THE STATE Respondent

JUDGMENT

FISHER J, (MAIER-FRAWLEY AJ CONCURRING:

INTRODUCTION

[1] This is an appeal against the conviction and sentence of the appellant in the Boksberg Regional Court. The appellant was charged with rape. The provisions of section 51 and schedule 2 part I of the Criminal Law Amendment act 105 of 1997 were stated in the charge sheet to be applicable in that: “complainant was 16 years old at the time of the commission of offence”.

[2] The appellant was legally represented at the trial and in these proceedings. The magistrate convicted him "as charged".

[3] He was sentenced to life imprisonment on the basis that the magistrate stated that he found no circumstances which moved him to depart from the prescribed life sentence.

[4] The appellant has an automatic right to an appeal and this appeal is dealt with pursuant to such right.

[5] The complainant testified as did two of her friends, Ms N S and Ms B C. Both Ms S and Ms C were witness to certain parts of the night on which the rape took place. The appellant testified and called no witnesses.

[6] I shall refer to the witnesses by their given names for the sake of convenience and to accord with the manner they have been referred to in the record.

FACTS

[7] The uncontroverted evidence reveals that the appellant and his acquaintance Mr Grant Thompson were out for a night of entertainment. They and some friends had booked three rooms in a guesthouse being the Amarula Guesthouse in Boksburg. The purpose of the booking of these rooms was for the appellant, Grant, and others who were present on that night to use the rooms for recreational purposes. This would include having a social get-together of persons. The appellant

conceded that the rooms were also booked so that some of the men who participated in the booking could engage with their girlfriends in sexual intimacy.

[8] The appellant and Grant had been at the guesthouse and had then gone to a night club in central Johannesburg. They had returned to the guesthouse from the club. They seem to have decided, at this late stage of the evening, that they wanted female company. Grant got in touch with B. It is not clear how this contact was made but it was obviously by way of text message or phone call. The request of Grant was that B come out with him. She agreed and it was arranged that he would fetch her. She was, at the time, with the complainant and N at N's flat. The complainant had gone to N's flat that evening. She lived with her mother who had gone on a brief holiday and she did not want to be alone.

[9] Grant arrived to collect B. It was said that B was going with Grant to get food. The complainant agreed that she would accompany them to Mc Donald's to get food. She discovered that the appellant was in the car when she got into the car. She did not know him. B also did not know him. It seems that he and Grant were also not well known to each other.

[10] There is no doubt that when she got into the car, the complainant thought she was going to get food with B and her boyfriend. She obviously believed that she would, after having got food, be returned to N's flat.

[11] Instead Grant drove them to the guesthouse, after a brief stop at a garage to get petrol. The complainant was uncomfortable during this trip. She raised that she was concerned that Grant had not driven to the McDonald's as she had expected. She was told that they had to go via the guesthouse because friends needed to be collected. Thus her ordeal began. She testified that, whilst in the back of the car with the appellant he began to make advances to her. She protested. B confirmed that there was an altercation between the appellant and the complainant and that the complainant had complained to her that she was being inappropriately "fiddled with" by the appellant. This complaint was made to B at the petrol station when the appellant went to the shop to buy cigarettes.

[12] What is clear from all the evidence is that the complainant was placed in a dangerous position: she went with B into a car with two men who were strangers to her. These strangers had booked rooms at the guesthouse earlier. Their plan was that the women accompany them to this guesthouse. It seems clear that they were intent on having sexual contact in these rooms.

[13] The appellant was on parole, having served part of a sentence of 5 years for sexual assault. He was 26 years old at the time. The complaint was just 16 years old. He was worldly and she relatively innocent.

[14] After the stop at the petrol station, the parties went on to the guesthouse – as planned by the men. It seems that the women were kept in the dark as to the purpose of the visit to the guesthouse. B testified that she agreed to go to the guesthouse as she believed that Grant wished to collect other friends from the guesthouse.

[15] When they arrived at the guesthouse the complainant was still expressing disquiet as to why they were there. B and Grant got out of the car and started towards the entrance. The complaint testified that she got out of the car reluctantly. She was told by the appellant that he was to take the shoes of a friend to a room in the guesthouse and leave them there for him. He insisted, she said that she go with him. He pulled at her hand when she refused and eventually she agreed to go with him. She felt that she had little choice.

[16] He then took her to one room whilst Grant took B to the other. The third room was occupied by other friends who were socialising there. Once in the room the appellant made it clear that he wished to have sex with the complainant.

[17] She states that she said clearly that she did not want to have intercourse with him. She said that she was having her period and she told him so. She testified that he then forced her to have sex with him. She struggled and he forcibly put his hands down her pants and forced his finger into her vagina. All the while she says she was struggling to get away from him. She tried to run, but he pulled her back. She was specific as to the fact that he pulled her by the hood of the hooded jumper she was wearing as she tried to run away. She testified that he pushed her against the wall of

the room and choked her. She was afraid and she undressed under threat of violence and was told to get into the bed. She did as she was told and he then straddled her, forced her legs, apart and inserted his penis into her vagina. She screamed at a point. But he choked her and threatened to kill her if she screamed again. Grant came to the door at a stage but the appellant managed to get rid of him.

[18] It seems that there was an element of complicity between Grant and the appellant. Grant was present at court but was not called by the State or the defence.

[19] Importantly, B testified that she heard a scream, although she says she did not know where it came from. At this stage she did not know that the complainant and the appellant were in the room adjacent to the room that she and Grant were in.

[20] The complainant testified that she was naked in the room with the appellant for some time and that she asked to be allowed to put on her clothes. This was initially refused, but eventually she was allowed to dress and thereafter she was able to escape the room. This occurred when Grant came to the door and it was opened by the appellant.

[21] What is not in dispute is that she immediately reported that she had been raped to B, Grant and others who had been in the third room. She was, according to B, visibly upset in that there were tears in her eyes. The appellant however came from the room and denied that he had raped the complainant There followed an altercation where the complainant made it clear that she had been raped. This she did in the presence of all those at the guesthouse. They had congregated as they were about to depart for their homes and also because there was a furore which had arisen because of the accusation made by the complainant and the denial thereof by the appellant.

[22] The night ended with those who were at the guesthouse leaving for their respective homes. The appellant was allowed by Grant to ride home in the same car as the complainant. In fact he sat next to her. She continued to be distraught. He was dropped off at his home and she was taken back to N's flat. It was confirmed by N that she and B had been gone for some 2 to 3 hours at this point and that N had expected that the complainant and B would return after getting food. N confirmed

also that, when the complainant arrived home, she was crying and distraught and that she told her that she had been raped by the appellant.

[23] The complainant continued to assert that she had been raped. Early the next morning she went to a medical practitioner who confirmed that there had been sexual intercourse. The examination yielded results which showed that the complainant had had sex but that it could not be determined that the sex had not been consensual.

[24] The version of the appellant is that he was introduced to the complainant in the car. He says that after this short car ride the complainant agreed to come to the room which had been booked and to have sex with him. This is, notwithstanding that it was conceded that the complainant had no idea that she would be taken to an hotel room for the purposes of being alone with the appellant so that they could have sex.

ISSUES FOR DETERMINATION

[25] This court must determine whether the magistrate evaluated the evidence correctly in relation to the finding that the complainant had been raped.

[26] In relation to the sentence, this court must determine whether there was any misdirection.

DISCUSSION ON CONVICTION

[27] The evaluation of the magistrate properly took into account the fact that there was nothing to suggest consent and much to lead credence to the fact that the complainant was lured to the room on the pretext of having to drop something there for a friend. The complainant's contention that the appellant then began to make it clear that she had been brought to the room for the purposes of having sex was accepted. The appellant indicated that it was "a couples thing" i.e. that he had been paired with her and Grant with B for the purposes of each couple engaging in sexual

activity. This seems likely from the manner in which the girls were fetched and taken to the guesthouse where the rooms were booked.

[28] As stated, neither the State nor the defence called Grant. He was available to both. It seems that it is unlikely that Grant would have supported the version of the appellant to the effect that the complainant, unexpectedly brought to a hotel in the company of an older man she had never met, would immediately have consented to have sex with this man.

[29] The reasoning of the magistrate is, to my mind, unassailable. There is also a strong indication that Grant was complicit in the luring of the complainant to the guesthouse. The version of the appellant is, simply put, not reasonably possibly true.

[30] The complainant was a credible witness. She testified first through an interpreter and later directly. Although she was a single witness as to the rape, her version was corroborated in material respects in relation to her disquiet before being taken to the room, that she screamed, and that she was distraught and crying in the aftermath. She immediately reported the rape when she was reunited with B in the aftermath.

DISCUSSION ON SENTENCE

[31] The magistrate approached the matter on the premise that the conviction as charged attracted a minimum sentence of life imprisonment. The provisions of section 51 and schedule 2 part I of the criminal law amendment act 105 of 1997 were stated in the charge sheet to be applicable in that: “complainant was 16 years old at the time of the commission of offence”. The magistrate proceeded on this assumption and warned the appellant of the applicability of the section for this reason.

[32] It was only noticed by the magistrate at the time of sentencing, that the fact of the complainant being 16years of age, did not, trigger the minimum life sentence provisions, despite this being stated in the charge sheet to be the case.

[33] The magistrate, however, nonetheless decided to apply the life sentence provisions on a basis other than those which were stated in the charge sheet. He held in this regard that the fact that there was evidence that the complainant had been penetrated more than once: being the penetration with the finger as well as the penile penetration, meant that the minimum sentencing provisions could still be invoked - because the charge sheet had warned that a minimum sentence of life was applicable.

[34] This approach loses sight of the fact that this was not the case that the appellant came to meet. The magistrate misdirected himself in substituting a new basis for that stated in the charge sheet for the reason why the particular defence attracted a minimum sentence of life.

[35] The magistrate was thus mistaken in his finding that he was constrained by the minimum sentence provisions when passing sentence.

[36] In S v Legoa 2003 (1) SACR 13 (SCA) par [18] the following was said:

"*It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present."*

[37] It stands to reason that an accused should be apprised of the evidence which will be weighed up in determining the penalty jurisdiction in question. He cannot otherwise meet the case that has been pleaded in the indictment.

[38] *Mpati JA, in S v Ndlovu* 2003 (1) SACR 331 (SCA) para [12] stated the following in this vein *:*

> *"The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences.'"*

[39] The appellant was thus not called to meet a case of more than one rape. The indictment specifically charged the accused with only one act of penetration.

[40] Furthermore, the act of penetration with the finger could, on all the evidence, be read as part of that one act of rape. In *S v Blaauw* 1999 (2) SACR 295 (W) at 300 a-d, Borchers J held that;

"*Repeated acts of penetration cannot without more, in my view, be equated with repeated and separate acts of rape."*

The learned judge went on to suggest that a useful test might be to ask the question whether there are indications that, having penetrated the victim, the offender "formed the intent to rape her again".

[41] The appellant was previously convicted of an offence relating to the sexual violation of a person, for which he had been released on parole at the time of this offence. This is aggravating. There was also substantial planning involved in the orchestration of the rape which is also aggravating. There was furthermore no remorse expressed.

CONCLUSION

[42] There is no misdirection found in relation to the conviction.

[43] The magistrate erred in applying the constraints of S 51 read with Part I of Schedule 2 when sentencing.

[44] To my mind an appropriate sentence taking into account in all the circumstances would be 15 years.

ORDER

1. The appeal against the conviction fails.

2. The appeal succeeds in relation to sentence.

3. The sentence is set aside and replaced with the following:
"The accused is sentenced to 15 years in prison, such sentence to be deemed to have commenced on 23 February 2018."

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FISHER J

HIGH COURT JUDGE

GAUTENG DIVISION, JOHANNESBURG

I agree,

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MAIER-FRAWLEY AJ

HIGH COURT ACTING JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 23 October 2018.

Judgment Delivered: 13 November 2018.

APPEARANCES:

For the Appellant	**:** Adv M. Buthelezi.
Instructed by	**:** The Johannesburg Justice Centre.
For the Respondent	**:** Adv V. Sinthumule.
Instructed by	**:** NPA.