IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2011-09-23

Case Number: A683/10

REPORTABLE

In the matter between:

DANIEL MAVUNDLA Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 21 May 2010 the appellant was convicted of contravening section 3 of the Sexual Offences Act 32 of 2007 (rape) in the Benoni regional court and on the same day was sentenced to life imprisonment in

accordance with section 51(1) and Schedule 2 of Part I of the Criminal Law Amendment Act 105 of 1997 ('the Act'). The sentence of life imprisonment could be imposed because the appellant was found to have raped the complainant more than once. The appellant has an automatic right of appeal and appeals only against the sentence.

[2] The appellant pleaded not guilty to the charge and spontaneously explained that he is not guilty because he did not rape the complainant: she consented. The appellant's attorney gave a lengthy plea explanation, the essence of which is that the complainant agreed to have intercourse with him because she was grateful to him for rescuing her from robbers (or as his attorney put it: she returned the favour).

[3] The appellant formally admitted that on or about 1 September 2009 he had consensual intercourse with the complainant (L F K) on one occasion. As a result of the plea explanation and the formal admission the issue to be decided was whether the complainant consented to have sexual intercourse with the appellant or not.

[4] The appellant was clearly guilty of rape. The evidence against him was overwhelming and his defence of consent was so improbable that it could not be reasonably possibly true – see ***S v Shackell*** **2001 (2) SACR 185 (SCA)** para 30. The primary question to be answered in this appeal is whether the evidence established that the appellant had raped the complainant more than once to bring the provisions of

section 51(1) of the Act into operation. In this regard the appellant's counsel raises the following questions:

(1) Whether the court *a quo* misdirected itself by finding that the complainant was raped multiple times;

(2) Whether the trial court misdirected itself by finding that the appellant had the intention to rape the complainant multiple times;

(3) Whether the trial court misdirected itself by finding that the minimum sentence applicable in respect of the rape count was life imprisonment and not 10 years imprisonment.

It should be noted that the court *a quo*, without referring to any authority or analysing the evidence, pertinently found that the appellant raped the complainant more than once. As to the necessity for accurate understanding and careful analysis of the evidence in rape cases see ***S v Vilakazi* 2009 (1) SACR 552 (SCA)** para 21.

[5] The court *a quo* correctly accepted the evidence of the complainant. She was a very good witness and she gave a logical and coherent description of the incident. It can be summarised as follows: After the appellant had locked the door to his house he told the complainant to take off all her clothes which she did because of the knife the appellant

was holding. The appellant then ordered the complainant to get onto the bed where he inserted his penis into her vagina and had intercourse with her until he ejaculated. After that the appellant told the complainant to climb off the bed and hold onto it. He then penetrated her from behind and had intercourse with her until he ejaculated. (It is not clear how long this took.) After that the appellant told the complainant to get onto the bed again where the appellant had intercourse with her once more while she was lying on her back. The appellant ejaculated for a third time. (Again it is not clear how long this took). The appellant then fell asleep but the complainant woke him and asked for the key which he gave her. The complainant dressed and went home.

[6] The complainant was pertinently questioned about the intervals between the acts of penetration. The complainant could not estimate the time which elapsed between each act and testified that, in effect, there was one act of intercourse even though the appellant ejaculated three times. In answer to a question about the lapse of time after the intercourse on the bed and the intercourse while she was standing next to the bed she replied –

> 'What happened is after I got off the bed he followed me and he penetrated me.'

In answer to the court's question regarding rest periods in between she replied:

'No rest periods because we were on (the) bed and we climbed off the bed and he kept having intercourse with me.'

[7] The problem of whether such evidence establishes that the complainant was raped more than once was discussed in ***S v Blaauw*** **1999 (2) SACR 295 (W)** at 300a-g:

'Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separated 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. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.

Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place.

> The complainant was asked to explain how a single act of rape took about two hours and she then proceeded to supply the details I have quoted above. She was describing, in my view, at least two separate acts of rape. The first was near the bridge and it was terminated by the accused's ejaculation and withdrawal. The second took place some undefined time later about 12 paces away and a different position was initially adopted by the accused. In my view the difference in time, place and position between these two incidents is sufficient for them to constitute two separate acts of sexual intercourse and, hence, two separate acts of rape. Whether or not the third act of penetration at the foot of the tree constitutes a third rape or merely the continuation of the second rape, need not be decided. The accused raped the complainant twice and the magistrate was correct in his view that rape had been committed in the circumstances described in Schedule 2 of Act 105 of 1997, namely, and I quote from that Schedule: "In circumstances where the victim was raped more than once."'

[8] While I agree with the approach, the facts of the present case are clearly different from those in ***Blaauw***. In the present case the complainant was emphatic that there was no interruption in the intercourse, the appellant simply shifted the position of the complainant. While ejaculation could determine the end of intercourse, in this case that clearly did not happen. There is no suggestion that the intercourse ended and that the appellant withdrew his penis twice and formed the intention to rape the complainant on two further occasions. This was one prolonged act of intercourse.

[9] The court *a quo* therefore wrongly applied the provisions of section 51(1) of the Act and sentenced the appellant as if he had raped the complainant twice. Section 51(2)(b) of the Act prescribes a minimum sentence of 10 years imprisonment for a first offender who commits rape and the question should have been whether there were substantial and compelling circumstances which would justify the imposition of a sentence of less than 10 years imprisonment or whether there were aggravating circumstances which require that a sentence heavier than the minimum prescribed sentence be imposed.

[10] The following factors are in the appellant's favour: He was 29 years old at the time and was a first offender. In view of these facts he is probably capable of rehabilitation. He was a hawker and earned about R40 a day selling snacks and sweets. He was not married but he had a child of 7 years old. Apart from the injuries sustained by the complainant to her private parts the appellant did not cause the complainant physical injury. The appellant was in custody awaiting trial for $8^{1}/_{2}$ months.

[11] The following factors are aggravating:

(1) The appellant used a knife to ensure that the complainant did his bidding. Because of the knife the complainant complied with every direction which he gave her;

(2) The intercourse was prolonged and painful. According to Sister Gomes who examined the complainant after the incident and completed the J88 she found the following: swelling of the urethral orifice, the para-urethral folds, the labia majora (the lower segment), the labia minora, the posterior fourchette was red and there were small tears at 5-6 o'clock with increased friability and the fossa navicularis was swollen and red; the hymen was fibriated, it was very swollen and there were fresh tears at 5 o'clock; the complainant's vagina would not admit any fingers, it was so swollen that it was closed and it could not be examined. Based on these findings Sister Gomes reached the following conclusions:

1. The lady has lower abdominal pain form the violent penetration into the vagina;
2. The urethral area is swollen and red from first contact penal penetration;
3. There is a fresh tear in the very swollen hymen at 5 o'clock.
4. The hymen is so swollen that vaginal examination could not take place;
5. The posteria fourchette has numerous small tears from repeated attempts to penetrate the vagina when lady pulling away; and
6. Definite forced penetration with an erect penis.

Sister Gomes confirmed these findings and conclusions when she testified.

(3) The appellant refused to wear a condom when requested by the complainant to do so: this clearly exposed the complainant to the risk of sexually transmitted disease and/or infection from AIDS; and

(4) The complainant was severely traumatised. At about 08h00 on 31 August 2009 her boyfriend noticed that she was shaking, trembling and scared and at 14h00 Sister Gomes recorded that she was very emotional.

[12] In my view the aggravating facts justify a sentence heavier than the prescribed minimum sentence. I regard 12 years imprisonment as appropriate in all the circumstances. I have made allowance for the period of $8^1/_2$ months while the appellant was in custody awaiting trial.

[13] I make the following order:

I The appeal against sentence is upheld and the sentence of life imprisonment is set aside and replaced with a sentence of 12 years imprisonment;

II In terms of section 282 of Act 51 of 1977 it is ordered that the substituted sentence be deemed to have been imposed on 21 May 2010.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

F.G. PRELLER
JUDGE OF THE HIGH COURT

CASE NO: A683/10

HEARD ON: 23 September 2011

FOR THE APPELLANT: MR. M.G. BOTHA

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. S.A. SENOGE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 23 September 2011