

**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

- (1) NO REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

**CASE NO: A320/16**

**15/12/2017**

In the matter between:

**HENRY SHIKAYI SHAI**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**MOSOPA, AJ**

[1] The appellant was convicted in the Nelspruit Regional court of four (4) counts of rape as envisaged in section 3 of the Act 32 of 2007 read with the provisions of section 51(1) of Act 105 of 1997, and three counts of robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and one count of common robbery. The appellant was sentenced to life imprisonment in respect of the individual rape charges and further sentenced to 15 years in respect of robbery charges, counts 1, 4 and 6 and 6 years in respect of count 8 of robbery. It was ordered that sentences in all counts of robbery are to run concurrently with count 1 which is life) imprisonment. The appellant was further declared unfit to possess a firearm in terms of section 103(1) of Act 60 of

2000.

[2] The appellant was legally represented throughout his trial. This appeal is against both conviction and sentence.

[3] This appeal comes in terms of the provisions of section 309 (1)(a)(ii) of the Criminal Procedure Act 51 of 1977 which provides for an automatic right of appeal in the event the regional court sentences a person to life imprisonment.

### Conviction

[4] In all rape charges the appellant raised the defence of consent and was linked by his DNA in all the rape charges. In relation to the robbery charges the appellant exercised his constitutional right to remain silent and offered no plea explanation.

[5] The state in order to prove its case relied on the evidence of eight witnesses and the appellant also testified in his defence without calling any witnesses.

### Robbery and rape of Jane Maphanga

[6] The complainant and the appellant were not known to each other when they met on the 25<sup>th</sup> September 2010 next to Shoprite Checkers supermarket Hazyview. At that stage the complainant was in the company of the lady they were working together when the appellant emerged and pointed them with a firearm.

[7] He then instructed them to go with him to the bushy area, where her friend managed to run away and alerted the complainant's husband. The appellant undressed her and instructed her to bend down and then raped her. After raping her she took her cellphone to the value of R250, 00. The appellant then said to her that she must walk away and not look back at her and he took a different direction as to complainant.

[8] The complainant's husband Given Succeed Malope confirmed that her wife (complainant) came with her friend at his workplace and she left her bag with him, as they were going to buy food at Shoprite Checkers. After sometime

the friend came back running and she made a report to him about the person who was having a firearm and a knife and that person pushed them to the bushes but she managed to escape.

[9] He then went to that direction he was told about and met with his wife who was crying at that stage. She then pointed out the direction the appellant took to her husband and he then ran to that direction but could not find the appellant. His wife made a report of rape to him.

[10] Under cross-examination it was put to the complainant that before this incident she had sexual intercourse with the appellant and the complainant asked the appellant to seek employment for her, which were all denied by the complainant.

[11] In his judgment the magistrate took into account the fact that the complainant is a single witness in as far as the rape and robbery charges are concerned and approached her evidence with caution.

[12] The state bear the onus of proving the guilt of the appellant beyond reasonable doubt. Schwikkard and van der Merwe: Principles of Evidence (3<sup>rd</sup> ed) at paragraph 31.3.1 stated the following:

"It follows from the requirement that the state must prove an accused person guilty beyond reasonable doubt that the onus vests on it to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that he had the required intention, that the crime in question was committed. See also, *S v Van der Meyden* 1999 (1) SACR 447 (W); *S v V* 2000 (1) SACR 453 (SCA); *S v Mlambo* 1957 (4) SA 727; *S v Phado and others* 1999 (2) SACR 558 (SCA) and *S v Mavinini* 2009 (1) SACR 523 (SCA) at par 26."

I

[13] Rape can only be committed if the intercourse takes place without the consent of the person the sexual encounter is directed to. The appellant instructed the complainant to undress her clothes and she refused. The appellant then said to her that if she refuses to undress he will shoot her. The appellant then undressed the complainant and after that he had sexual intercourse with her.

[14] For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly by a person who has a mental ability to understand what she is consenting to, and the consent must be based on a true knowledge of the material facts relating to intercourse. In casu it is abundantly clear that the complainant's fear to submit to appellant's demand for sexual intercourse was induced by threats, i.e to shoot her, which cannot amount to consent.

[15] The complainant cellphone was taken away from her because at that stage the appellant was wielding a firearm and a knife. The cellphone was never recovered. This also add to the fact that the complainant did not consent to sexual intercourse, because if there was consent, there was no need for the appellant to rob complainant her cellphone .

[16] The magistrate was correct in finding that the identity of the perpetrator is not in dispute as the appellant raised a defence of consent and also that he was linked by his DNA.

[17] The appellant! testified that it was not the first time he had sexual intercourse with the complainant. However he fails to account to the fact that the complainant does not know him and the firearm was used during the commission of the offences. I agree with the magistrate in rejecting the version of the appellant as not only false but improbable beyond reasonable doubt and the appeal on conviction in relation to rape and robbery cannot succeed.

### Robbery and Rape of M M

[18] The complainant knows the appellant and they have worked together at [...]and she knows the appellant by the name of Themba. They worked together for a period for two months. She met the appellant at the Hazyview mall on the 5<sup>th</sup> April 2011 wherein she was in the company of Prudence. As they were walking the appellant grabbed her by the shoulder and Prudence realized that something wrong was happening and she ran away. She tried to run away when Prudence was running away and the appellant grabbed her.

[19] After grabbing her the appellant assaulted her with a fist and produced a

knife. The appellant then instructed her to undress her panty and said she must kiss her but she refused after that he then undressed her the trouser and instructed her to undress her panty and she complied, thereafter the appellant raped her in a bushy area. After raping her he then took a different direction as the complainant. Also after that he took his two Nokia cellphones to the value of R500,00 and also robbed her R50,00 cash.

[20] The complainant after being raped she went up to the road and met with Ms L G who was by that time unknown to her who was a street vendor. She then asked Ms G to phone her cousin who eventually came.

[21] The appellant denied raping the complainant but admitted to have had sexual intercourse with the complainant with her consent. He said he secured employment for the complainant and she promised to thank him by having sexual intercourse with him.

[22] Ms G testified that as she was busy selling table cloths on the street she saw the complainant who was crying at that stage. She then approached the complainant and asked her why is she crying and she told her that she was raped. She reported to her that the person who raped her used to work with her and she promised her employment before raping her. She also confirmed that the complainant took her cellphone and money.

[23] The magistrate approached the evidence of the complainant with causation taking into account the complainant is a single witness to the rape and robbery charges.

[24] The complainant knows the appellant prior to the commission of the offence as they used to work together for a period of two months. There is no issue with regards to the identity of the perpetrator. The appellant also raised the defence of consent and he is further linked by his DNA.

[25] The appellant assaulted the complainant before having sexual intercourse with her and further produced a knife to threaten her. The conduct of the appellant excludes consent. The appellant requested the complainant to kiss her before having sexual intercourse with her but she refused. Common sense dictates that if she was a willing partner she could have easily afforded the appellant the kiss he was looking for.

[26] The magistrate was correct in rejecting the appellant's defence of consent and convicting the appellant of rape. The conviction of robbery was equally correctly arrived at because when the appellant committed the offence he was having a knife and he further assaulted the complainant. The money and cellphone that were robbed from the complainant were never recovered. Prudence ran away after realizing what the appellant was up to, if really the complainant and the appellant agreed to have sexual intercourse they could have easily asked Prudence to leave. The appeal against conviction in respect of this counts cannot succeed.

#### Robbery and rape of S P

[27] She testified that she met the appellant at Hazyview Pep Store who was at that time unknown to her on the 16 April 2011. The appellant told her that his employer needs a domestic worker. He then said to her that he can accompany her to his employer. The appellant told her that they must use the road which goes in the bush as is it a short cut to his employer's place. In the middle of the bushes the appellant then pointed a firearm at her and hit her with an open hand on her face.

[28] The appellant then said she must take off her panty and ordered her to lie down and then rape her. After raping her he robbed her R400,00 in cash and groceries to the value of R200,00. He then took a different direction as that of the complainant. The complainant then went to the police station to lay charges against the appellant.

[29] It was put to the complainant that the appellant proposed love to her and she told him that she is a prostitute who charges R150,00 for her service. That was denied by the complainant.

[30] Ms Nomalanga Beauty Lubando a sergeant in the South African Police Station, stationed Masoyi Police Station, saw the complainant on the day she was raped and described her as upset and depressed. When she asked her what happened to her before she could relate the story she started to cry and at that stage the complainant was coming to lay a charge of rape at the police station.

[31] The appellant testimony is nothing but contradiction. He testified that he

proposed love to the complainant but when they meet on the next occasion the complainant is no a prostitute who charges for her services. It does not make sense to pay for the services of the person whom you are in love with.

[32] The complainant never met the appellant on any other day except for the day of the alleged rape. The appellant was unknown to the complainant but they happened to be in \lto one another's company as the appellant promised her employment.

[33] The fact that \the appellant pointed the complainant with a firearm and assaulted her excludes consent. The complainant's money and groceries were robbed from her bee: use the appellant was armed with a firearm. The magistrate was correct in rejecting the appellant's version. The appeal against both conviction in respect of rape and robbery cannot succeed.

#### Robbery and Rape of P T S

[34] On the 2<sup>nd</sup> May 2011 she met the appellant as she was entering the CD store, the appellant as unknown to her at that stage. The appellant then asked her as to whether she, was working and informed her that his employer is looking for someone who c came and work for her. At that stage she was still busy and they exchanged telephone number and promised the appellant to call him later.

[35] After she was 'done with what she was doing she phoned the appellant who came and proceed d with her next to Shoprite store. The appellant then proceeded with her in the road on to bushes and he informed her that it is short cut to his employers lace. Inside the bushes they came to a stop and the appellant told her to take of her clothes. The appellants assaulted her with open hand on her face when she refused to undress. The appellant then undressed her the trouser and also too off her panty and ordered her to bend forward. Then after that he raped her. after raping her she robbed her R600, 00 but later gave her R120,00 back and took with him the rest of the money.

[36] The appellant after robbing and raping the complainant took her cellphone and deleted his numbers on the complainant's phone. After the appellant left she went to the police station to lay charges against him. Ms Peggy Shilangu a police officer who attended the complaint by the complainant testified that when the

complainant entered the police station she started to cry and she asked her what happened to her and she said to her that she was raped.

[37] In this counts like all over rape counts the appellant used the same *modus operandi* to lure his victims. He promised them employment by telling them his employers are looking for someone to work for them. He will then take them next to Shoprite Store then proceeded to the bushes telling his victims that the way is short cut to hf employers' place. In the middle of the bushes he will then point them with a knife or firearm and then assault them. Eventually he will rape them and rob them their personal belongings. After raping them he will take a different route as is victims. All the victims of the appellant except for Ms M M, did not know the appellant. The DNA of the appellant was found in all his victims

[38] However hen the appellant testified he indicated that he has been knowing his victims long before the rape incident and in some instances they did have sexual intercourse with him prior to the incidents reported. The appellant went to the extent pf even saying that one of his victims is a prostitute.

[39] The appeal- against conviction on the count of rape and robbery cannot succeed. The magistrate approached the evidence of the complainant with caution as he was single witness. The magistrate did not err in rejecting the evidence of the appellant relating to the fact that the complainant consented to sexual intercourse The conduct of the appellant excluded consent. The complainant was robbed of her money which has since not been recovered. No weapon was used in the commission of this offence and the assault on the complainant was not so severe to amount to infliction of grievous bodily harm, and the magistrate as correct in convicting the appellant of common robbery.

### Sentence

[40] The appellant was sentenced to life imprisonment for every conviction of a rape count and further sentenced to 15 years imprisonment on robbery counts and 6 years on count,7 of robbery as the magistrate find that it is common robbery.

[41] In the life sentences imposed the magistrate relied on the provisions of section 51(1) of Act 105 of 1997 which provides as follows:



"Notwithstanding any other law but subject to subsections (3) and (6), a high court shall, if it has convicted a person of an offence referred to in part 1 of schedule 2, sentenced the person to imprisonment for life."

[42] Section 51(3) of the Act provides as follows:

"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence presented in those subsections, it shall enter those circumstances on the record of the proceedings and may impose such lesser sentence.

[43] In justifying the imposition of life sentences in rape charges, the presiding magistrate relied on the case of *S v M* 2013 (2) SACR 297 (SCA). Not taking away anything from the principle that was laid out in that case the magistrate misdirected himself by following that authority as it related to the rape of the minor child.

[44] In casu all the complainants were adult people, they were not raped more than once by the appellant and they were not raped by two or more people or were mentally challenged :

[45] Part 1 of schedule 2 (Section 51) provides that rape can only attract life imprisonment when committed:

- "(a) In circumstances where the victim was raped more than once;
- (b) By more than one person;
- (c) By a person convicted of two or more offences;
- (d) Where the victim is under the age of 16 years;
- (e) Physically disabled woman, who is rendered vulnerable due to his physical ability;
- (f) Mentally ill woman."

[46] The magistrate in not invoking the provisions of section 51 (2) of the Act when sentencing the appellant for the rape charges materially misdirected

himself which vitiates that this court should interfere with his sentence.

[47] In *S v Malgas* 2001(1) SACR 469 at paragraph 12 Marais JA held that: "A court exercising appellate jurisdiction cannot in the absence of material misdirection by the trial court, approach the question of sentence as if it were trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentencing afresh. In doing so, it assesses sentences as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", startling" or "disturbingly inappropriate."

[48] Section 51 (2) of Act 105 of 1997 provides as follows: "Notwithstanding any other law but subject to subsection (3) and (6) a regional court or a high court shall :

- (b) if it has convicted a person of an offence referred to in part III of schedule 2 sentence the person in case of;
  - (i) a first offender, to imprisonment not less than a period of 10 years

Rape is one of the offences listed or referred to in part III of Schedule 2 of Act 105 of 1997

[49] The appellant is a first offender. He failed to show that there are compelling and substantial circumstances. However due the material misdirection as mentioned above the rape sentences ought to be substituted.

[50] A robbery sentence in terms of section 51 (2)(a)(i) attracts a sentence of 15 years in the case of a first offender. The magistrate when sentencing the

appellant came to the conclusion that there exists no compelling and substantial circumstances in the case of the appellant and sentenced him according to the prescribed minimum sentence.

[51] I see no reason to interfere with the sentences on counts 1, 3 and 5 of robbery with aggravating circumstances and also with regard to sentence in count 7 of common robbery.

### Conclusion

[52] The appellant's appeal with regard to all counts of rape succeeds and they ought to be substituted. The appellant's appeal in relation to the sentences on counts of robbery cannot succeed.

### Order

[53] I therefore make the following order:

1. The appeal against conviction in respect of all counts is dismissed.
2. The appeal against sentences in counts 2, 4, 6 and 8 is upheld;
3. The sentences of the magistrate are set aside and substituted with the following, sentence:
  - a) Count 1, accused is sentenced to 15 years imprisonment;
  - b) Count 2, accused is sentenced to 10 years imprisonment;
  - c) Count 3, accused is sentenced to 10 years imprisonment;
  - d) Count 4, accused is sentenced to 15 years imprisonment;
  - e) Count 5, accused is sentenced to 10 years imprisonment;
  - f) Count 6, accused is sentenced to 15 years imprisonment;
  - g) Count 7, accused is sentenced to 10 years imprisonment;
  - h) Count 8, accused is sentenced to 6 years imprisonment;
4. It is ordered that the sentence imposed in count 2 will run concurrently with the sentence imposed in count 1. Sentence in count 3 will run concurrently with the sentence in count 4. Further that the sentence imposed in count

4, 5 years of the sentence will run concurrently with sentence in count 1. The sentence in count 5 will run concurrently with the sentence in count 6. Further that 5 years of the sentence in count 6 will run concurrently with a sentence in count 1. The sentence in count 8 will run concurrently with the sentence in count 7. Therefore the appellant is effectively ordered to serve 45 years imprisonment.

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M.J Mosopa

Acting Judge of the High Court

I agree

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C.P Rabie

Judge of the High Court

#### APPEARANCES:

For the Applicants:

Adv L. A van Wyk

Instructed by:

Legal Aid South Africa, Pretoria

For the Respondents:

Adv B.E Maoke

Instructed by:

Director of Public Prosecutions, Pretoria