IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 171/2014

In the matter between:

SIPHAMANDLA DLAMINI **APPELLANT**

v

THE STATE **RESPONDENT**

APPEAL JUDGMENT

POYO DLWATI J (CHILI J et BOOYENS AJ Concurring):

[1] The appellant, who had been charged together with one other (accused no 2), was convicted of 2 counts of kidnapping (counts 4 and 5), 3 counts of rape (counts 2, 6 and 7) and 2 counts of assault with the intention to do grievous bodily harm (counts 3 and 8). The provisions of section 3 read with the provisions of section 1, 55, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1997, further read with section 256 and 261 of the Criminal Procedure Act 51 of 1977 (the Act) and the relevant provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997, were applicable. It was alleged that the appellant had raped the complainants in counts 6 and 7 more than once. In respect of counts 4 and 5 the appellant was sentenced to 5 years imprisonment on each count. In respect of counts 3 and 8, he was sentenced to 2 years imprisonment. He was sentenced to 10 years imprisonment on count 2 and life imprisonment in respect

of counts 6 and 7 individually. All sentences were ordered to run concurrently with the life imprisonment sentences imposed on counts 6 and 7. With the leave of the *court a quo* the appellant appeals against the convictions in counts 4, 5, 6 and 7 and sentences in count 6 and 7.

[2] The evidence tendered by the prosecution revealed that all charges arose out of incidents that happened in the early hours of 26 December 2011 at Epanekeni in Inchanga. The complainants (N[…] M[…], complainant in counts 1,2 and 3; G[…] M[…], complainant in counts 4,6 and 8; and No[…] M[…], complainant in counts 5 and 7) had been at the S[…] homestead during that evening, where they were chased away by M[…] S[…] (G[…]'s boyfriend) and his brother. As they ran in different directions, No[…] and N[…] came across an unknown young man (referred to as "the boy" in the record) who offered to accompany them to their place of residence. Along the way, they met with the appellant who enquired from them as to where were they going. They told him that the boy was accompanying them home. They also told him that they want to go home and call the other girl who was with them but got lost when they were running away from the S[…] homestead. The appellant then suggested that they should proceed to the S[…] homestead, told them (No[…] and N[…]) that he was not afraid of the S[…] boys and undertook to help them find G[…]. The appellant thereafter told N[…] that she would go with him and the young man would go with No[…]. No[…] and the young man left.

[3] As they were walking near the sports field the appellant instructed N[…] to stop and she did. He asked her to kiss him but she refused. He slapped her with an open hand. At that stage No[…] and the young man were at a distance from them. N[…] could not see them. The appellant was carrying a torch, a stick and a broken bottle neck. After he slapped her, she fell on the ground. The appellant stamped over her with his feet and also put his foot on her cheek. Her left arm and leg were sore as a result. He then removed the leggings that she was wearing and her panty. He climbed on top of her, inserted his penis into her vagina and had sexual intercourse with her. When he finished he told her to get up and dress as he was done with her. He told N[…] that he was going to take No[…] and that N[…] was to go with the young man. The appellant also dressed up and they went to where

No[…] and the young man were. N[…] walked home with this young man and left No[…] with the appellant.

[4] The appellant asked No[…] to kiss him but she refused. He told her that he would do to her what he had done to N[…]. No[…] then kissed him. The appellant then went to a certain homestead[1] and told No[…] to go with him otherwise he would assault her. The appellant pushed open the door to the house and they got into a bedroom. The appellant searched No[…] but did not find anything. He took off her trousers and the tights that she was wearing. He told her to take off her panty but she refused. He slapped her with an open hand. She then took off her panty. He undressed and put No[…] on the bed and told her to open her thighs. She refused and he slapped her again. She then opened her thighs and he thereafter inserted his penis into her vagina and had sexual intercourse with her. After he finished he told her to dress up and he would walk her home. They then left that house and used a different route than the one they used when they went to the said house. The appellant told her it was a short cut. As they were walking she noticed someone who looked like G[…] in another homestead and she went to her. They were happy to be reunited. The appellant told them to go inside that home.

[5] This was the home of his erstwhile co-accused, accused no 2.[2] They went inside that house where G[…] had been sleeping, sharing a bed with accused 2. The appellant locked the door and asked accused 2 why he was sleeping with a woman facing opposite directions. The appellant then told accused 2 that he could not just sit with G[…], without giving him anything. He then took G[…] and went with her to the bedroom. No[…] thereafter heard G[…] crying. Thereafter the appellant appeared from the bedroom and asked accused 2 why they were just sitting there doing nothing. He asked accused 2 for condoms and they found 1 condom which the appellant took. He then instructed accused 2 to sleep with No[…]. The appellant undressed No[…] and put her in bed. Accused 2 then inserted his penis into her vagina and had sexual intercourse with her. After that the appellant went to the bedroom where G[…] was. After the appellant had finished with G[…] he took No[…] to the bedroom and again had sexual intercourse with her. After he finished with

[1]. Homestead depicted in photo 1, Exhibit "D"

[2]. See photographs at pages 239 and 240 of the record depicting the house of accused 2.

No[…] he took G[…] to the bedroom again and had sexual intercourse with her. After a while G[…] and the appellant came out of the bedroom and G[…] asked for water. The appellant accompanied her to a nearby tap where she drank water and they came back to accused 2's home. The appellant locked the door again. They requested to go home but the appellant refused. After sometime accused 2 asked if they wanted to go home and they agreed. They all left accused 2's home. On their way the appellant went with accused 2's brother in search of beer. Accused 2 was guarding No[…] and G[…]. They managed to run away from accused 2 and got to their home.

[6] At home they found N[…] and they related what had happened to them to their aunt, M[…] T[…] M[…]. The police were summoned to the scene and the appellant and accused 2 were later arrested.

[7] During his trial, the appellant was legally represented. He pleaded not guilty to all charges. Various admissions were made in terms of section 220 of the Act. In a statement made in terms of section 115 of the Act the appellant admitted having had sexual intercourse with N[…] and No[…] but averred that it was by their consent. He denied having had any sexual intercourse with G[…] at all. He further denied having assaulted G[…], No[…] and N[…]. With regards to the kidnapping charges, he denied having kept the complainants at accused 2's home without their will. The learned judge *a quo*, after hearing all the evidence acquitted the appellant on count one only and convicted him on all the remaining charges. Accused no 2 on the other hand was acquitted on all charges.

[8] At issue is whether the learned judge *a quo* erred in finding that the State had proven beyond reasonable doubt that the appellant had raped the 3 complainants, had assaulted them and also kept them at accused 2's home against their will. Furthermore it was argued that the kidnapping charges led to the duplication of convictions as the evidence that led to the conviction in the rape charges was the same as that of the kidnapping charges. It was further argued that the sentences of life imprisonment were disturbingly shocking and were disproportionate to the offences committed.

[9] On the rape charges on No[…] and N[…] the issues for determination are whether they consented to have sexual intercourse with the appellant and whether it was more than once. The other issue is whether the appellant raped G[…]. I have alluded to the State evidence in this regard. I pause to mention that the DNA evidence admitted into evidence as exhibit "J" confirmed that the appellant was indeed the donor of the DNA found in No[…] and N[…]. The evidence of No[…] was that the appellant had said he would go with N[…] first and later took No[…] and told her that he would do to her what he did to N[…]. At different occasions he slapped them and forced them to take off their clothes. N[…] was limping as a result of the assault. Her injuries are corroborated by the J88 report admitted into evidence as exhibit "G". N[…]'s evidence is further corroborated by the report she made to T[…], No[…] and G[…] a few hours after the rape. Given the circumstances of the present case, I am of the view that it is highly improbable that N[…] would cry rape a few hours after having had sexual intercourse with the appellant if she had consented to it.

[10] No[…] was first raped in a certain homestead which she was able to identify in the photo album, exhibit "D". She denied having consented to having sexual intercourse with the appellant as he alleged, in that house. She was again raped by the appellant at accused no 2's house. Her evidence in that regard is to a large extent corroborated by G[…] who testified that she heard No[…] crying when she was in the bedroom with the appellant. On the other hand, G[…] and No[…] corroborated each other when they testified that when G[…] returned from the bedroom where she had been with the appellant, she was crying. The appellant came out of accused 2's bedroom and asked accused 2 why he was just sitting with No[…]. He instructed him to sleep with her. It could, in my view, safely be inferred that the appellant had had sexual intercourse with G[…] and wanted accused no.2 to do the same with No[…]. The appellant took turns raping No[…] and G[…]. He was the one instructing others as to what to do in accused 2's home. He was even feared by accused 2 according to G[…] and No[…]'s evidence. Shortly after they made good their escape No[…] and G[…] related what had happened to them to Thabile and that is when the police were called. Their reporting of the rape to Thabile is inconsistent with people who had consensual intercourse with the appellant. The

court *a quo* found G[…], N[…] and No[…] to be good witnesses. They told a clear, coherent story to the court. They were unshaken under cross examination. I am satisfied that the version they related to the court *a quo* is a correct account of what transpired during that fateful evening. It is clear on record, that the court a quo was fully alive to the fact that it was dealing with single witnesses whose evidence had to be approached with caution and further, that it called for sufficient safeguards in order to reduce the risk of a wrong conviction. One such safeguard is corroboration. By corroboration is meant other evidence which supports the evidence of the State witness and which renders the evidence of the accused less probable on the issues in dispute.[3] With regard to N[…] and No[…]'s evidence there is sufficient corroboration of the rapes. They are further corroborated by their reports to Thabile and the injuries depicted on the J88. In my view, the only reason why the appellant admitted that he had sexual intercourse with N[…] and No[…] is because he had his back against the wall. He found himself in a position where he felt obliged to explain how his DNA landed on the two complainants (N[…] and No[…]).

[11] G[…] is corroborated by No[…] and accused 2 that at some point during that evening she was with the appellant alone in the bedroom. She testified that she was raped twice by the appellant. She shortly thereafter reported the rape to Thabile. The J88 report admitted into evidence as exhibit "H" also confirms that there were fresh injuries in her vagina. I therefore believe that there is sufficient corroboration of her evidence. On the other hand, the appellant's version that he was never in the bedroom with G[…] is not reasonably possibly true. In my view, the learned judge *a quo* correctly considered the conspectus of the evidence and weighed the pros and cons and made a judiciously considered judgment. It is trite that the court that is best placed to check the demeanour of a witness is the trial court. The court of appeal can therefore interfere with a trial court's evaluation of oral testimony only in exceptional circumstances. [4] As held in *R v Dhlumayo and Another* 1948 (2) SA 677 (A), a court of appeal will not disturb the factual finding of the trial court unless the latter has committed a misdirection. Where there has been no misdirection on facts by the trial court, the presumption is that his conclusion is correct.

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[3] . In this regard see *S v Gentle* 2005 (1) SACR 420 (SCA) para 18 at 430j - 431a.

[4] . In this regard see *S v Francis* 1991 (1) SACR 198 (A) at 204c.

[12] This leads me to the kidnaping charges, (counts 4 and 5). The evidence of G[…] and No[…] was that the appellant locked the door after they had entered accused 2's home. They could not remember if he kept the key with him. G[…] testified that her request for water was an attempt to escape from the appellant. Little did she know that the appellant would guard her to and from the tap. After their return from the tap the appellant again locked the door. They wanted to leave accused 2's home but the appellant told them that they were mad, they could not leave as it was late at night. In my view they must have wanted to leave irrespective of the fact that it was at night because all the appellant was doing was taking turns to rape them. In my view G[…] and No[…] were honest witnesses. If they wanted to falsely implicate the appellant they would have told the court, for instance, that the appellant kept the key in his pocket after locking the door. But they were honest and told the court that they could not remember. I am satisfied therefore that on the totality of the evidence the trial court was correct in concluding that the guilt of the appellant in respect of the kidnapping charges was established beyond reasonable doubt.

[13] The further argument advanced in pursuing the appeal was that there was a duplication of convictions with regard to the kidnapping and rape charges. It was argued that for a person to rape another, the rapist must hold the victim against his or her will and therefore deprive him or her of his or her freedom. It has been a rule of practice in our courts that where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences.[5] The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. [6] No[…] and G[…] testified that they wanted to leave especially after the rapes were perpetuated on them but the appellant told them they could not leave as they were going to report them to the police. The appellant did not only restrain the complainants when he was raping them but also kept them even after he had raped them thus unlawfully and intentionally depriving them of their liberty. I am therefore not persuaded that the trial court misdirected itself in any way either in its

[5]. In this regard see *Ex parte Minister of Justice: In re R v Moseme* 1936 (AD) 52 at 59.
[6]. In this regard see *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) at 523B-524A.

assessment of the facts, credibility findings it made and the separate convictions it came to. It follows that the appeal against convictions must fail.

[14] Turning to the appeal against sentence, it was argued that the sentences of life imprisonment were harsh, shocking and out of proportion in the circumstances of this case. It was argued that the learned judge *a quo* failed to take into account that the age of the appellant, the fact that he was under the influence of alcohol or drugs when he committed these offences were substantial and compelling circumstances that justified the imposition of less severe sentences than life imprisonment. It was further argued that the rapes were not premeditated. In support of this argument, counsel for the appellant submitted that had the complainants not decided to walk at night when everybody was under the 'spell of Christmas', the appellant would not have committed these crimes. Furthermore, the complainants were not seriously injured, it was so argued.

[15] It is trite that a court of appeal will not interfere with sentence unless it is vitiated by misdirection or the sentence is inappropriate and induces a sense of shock. In my view, the court *a quo* did not misdirect itself in any way. The appellant became a serial rapist in one night, committing acts of rape more than five times against three different complainants. Such people are dangerous to the society especially to women and girl children. No remorse was shown by the appellant despite the fact that the evidence was overwhelming against him. Furthermore, women in this country are entitled to the protection of their rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.[7] The appellant testified that even though he was drunk he was fully aware of what was happening and did not forget what had happened that night. His moral blameworthiness was not diminished. In my view, the appellant's personal circumstances are far outweighed by the seriousness of the offences and the interests of society. It is the duty of this court to send a clear message to the appellant, other potential rapists and to the community that the

[7] . In this regard see *S v Chapman* 1997 (2) SACR 3 (SCA) 5 at 5b-c.

victims of rape will be protected. Having given due regard to all the facts presented to the court *a quo,* I am not persuaded that substantial and compelling circumstances existed that warranted deviation from the imposition of sentences of imprisonment for life in respect of counts 6 and 7. In the circumstances, the appeal against sentences should also fail.

Order

[16] I therefore make the following order:

(a) The appeal against convictions and sentences is dismissed.

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POYO DLWATI J

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CHILI J

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BOOYENS AJ

APPEARANCES

For Appellant:	L.M Phungula
	Instructed by L.M Phungula & Co.
	033 342 6657
For the Respondent:	Adv duToit
	Instructed by The Director of Public Prosecutions (PMB)
	033 845 4400
Date of hearing:	28 January 2015
Date of Judgment:	06 February 2015