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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGHT COURT KIMBERLEY)**

Case number: **CA&R 134/ 16**

Date heard: **27 /03/ 2017**

Date delivered : **31/03/ 2017**

In the matter of :

PETRUS VAN NEL

1st APPELLANT

VINCENT LONG

2nd APPELLANT

and

THE STATE

RESPONDENT

Coram: Williams J et Snyders AJ

JUDGMENT

SNYDERS, AJ

1. The appellants were found guilty of the following charges in the Regional Court, Douglas on 20 October 2015 :

1.1. Count 1: The rape of Amanda S. K. (K.) by 1st and 2nd appellant;

1.2. Count 2: The rape of S. E. by 1st and 2nd appellant;

1.3. Count 3: The rape of K. by 1st appellant;

1.4. Count 4: The rape of E. by 2nd appellant;

1.5. Count 5 : The rape of E. by 1st appellant.

2. First and 2nd appellant were given life sentences on Counts

1 and 2. First appellant was sentenced to 10 years imprisonment on both counts 3 and

5. Second appellant was sentenced to 10 years imprisonment on Count 4. The sentences on all the counts will run concurrently.

3. First appellant now appeals against his convictions and sentence and 2nd appellant only appeals against his sentence.

4. Both appellants were legally represented at the trial and pleaded not guilty. Their plea explanation was that 1st appellant had consensual intercourse with K. and that 2nd appellant had consensual intercourse with E..

5. The two complainants both testified to being forcefully apprehended by the appellants. They both testified to the rape of each complainant by each appellant in the veld. E. was raped twice by 1st appellant in the veld. Both confirm the further rape of K. by 1st appellant and of E. by 2nd appellant at I. K.'s house. I. K. confirmed opening the door when the complainants knocked as well as their report of the rape. K. and I. K. testified to E.'s distraught emotional state. This was also highlighted during the testimony of Dr Morolong who examined the complainants and completed the J88 medical examination forms.

6. The forensic analysis done on swabs taken from K., positively identified 1st appellant's DNA. She had two tears on her genital areas, which were both ½ cm long and 1mm deep. She had an abrasion on her right knee and a laceration on her left hand. All this

objective evidence corroborated the testimony of the complainants.

7. The complainants' versions were further corroborated by Ronald Valentine. He was walking the complainants home when the two appellants apprehended the complainants and scared him off.

8. The 1st appellant denied having raped E. by inserting his penis into her mouth and into her vagina. He denied having raped K. twice by putting his penis into her vagina. He instead alleges that intercourse with K. was consensual and that they were in a relationship and agreed to meet at the tavern on the evening in question. K. and E. denied knowing 1st appellant prior to the incident. As correctly pointed out by the Magistrate in her judgment, the complainants' methods of describing the appellants (the long one; the one who had K. first and so forth) do not denote prior knowledge of the identities of the appellants.

9. The 1st and 2nd appellant contradicted each other in their testimony. They could not seem to agree on where the complainants were standing at Chico's house, whether 1st appellant and K. were present when 2nd appellant brought E. home, where the complainants were during the housebreaking and where they went directly after the housebreaking. These are but a few contradictions that show that the appellants' versions are not reasonably possibly true. The Magistrate further did not misdirect herself in not accepting the evidence of 1st appellant's witnesses, as the objective facts did not support their testimony.

10. The complainants' behaviour during the entire episode seemed at odds with normal behaviour. K. does not call for help on her cellphone, the complainants do not seek assistance from the van that stops or from the group of men they encounter and

they do not flee when the appellants are urinating. Their behaviour must however be seen in light of the trauma they had experienced. They were 2 slightly built girls (as seen on the J88) who had just been raped twice and were being taken on a nightmare trip through the neighbourhood by two armed appellants. The explanation simply boils down to fear for their lives.

11. In *S v Chabalala*^[1], the court stated the following:

"The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SAR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused 's guilt ".

12. Having viewed the evidence holistically, I find that Mr Van Tonder who appeared for the appellants correctly conceded that the Magistrate did not misdirect herself in convicting the 1st appellant and the appeal on his convictions stands to fail.

13. With regard to the sentences imposed, it is trite that the prescribed minimum sentences are not to be departed from lightly and for flimsy reasons.^[2]

14. This matter seems to be what the learned judge had in mind when formulating the judgment in *S v MM*^[3]. The court held that although contentious, there are categories of severity of rape and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.

15. K. was raped twice by 1st appellant and once by 2nd appellant. She was further traumatised by 1st appellant by having to kiss him and entertain conversations with him to avoid further injury to herself and E.. E. was raped twice by both appellants. Both complainants attempted to commit suicide. 1st appellant had a previous conviction of rape and 2nd appellant had a previous conviction of housebreaking and assault.

16. Neither 1st nor 2nd appellant have any substantial and compelling circumstances present in their personal circumstances. The appellants had both waived their right to apply for bail and though both appellants spent almost four years in custody waiting on finalisation of the matter, this factor on its own does not constitute a substantial and compelling circumstance. The delay in the proceedings was also partly caused by the withdrawal of the appellants' attorney mid-trial, necessitating the typing of the record and the appointment of new legal representation.

17. Based on the above, I find that the magistrate did not misdirect herself in the sentences she imposed on the appellants.

WHEREFORE THE FOLLOWING ORDER IS MADE:

a) The 1st appellant's appeal against his convictions and sentences imposed is dismissed.

b) The 2nd appellant's appeal against his sentences imposed is dismissed.

J .A.SNYDERS

ACTING JUDGE

I concur

C.C WILLIAMS

JUDGE

On behalf of Appellant: Mr A Van Tonder (Legal Aid)

On behalf of Respondent: Adv J.S Mabaso (DPP)

[\[1\]](#) 2003(1) SACR 134 (SCA) at 139H-I40A

[\[2\]](#) See *S v Malgas* 2001 (1) SA CR 469 (SCA) at 48 1 j

[\[3\]](#) 2013(2) SACR 292 (SCA) at 292 C-E