SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. A613/2008
DPP Ref.. No. JAP2009/0023

In the matter of:

ROGERS MHLANGO	First Appellant
EDWARD PETROS LANGA	Second Appellant
JUSTICE PETROS LANGA	Third Appellant

versus

THE STATE

MEYER, J

[1] The Regional Court, Roodepoort convicted each appellant of rape and of robbery with aggravating circumstances. They were each sentenced to life imprisonment for their convictions of rape and to fifteen years' imprisonment for their convictions of robbery. Appellant 1 appeals against his convictions of rape and of robbery and against the sentences imposed upon him. Appellant 3 appeals against his conviction of robbery. Appellants 2 and 3 appeal

against the sentences imposed upon them pursuant to their convictions of rape.

[2] On 20 January 2006, at about 9:30 pm, Mr Zwedi Dube, his wife Ms Bongikile Hlongwane, and their three year old child were forced out of their Volkswagen Kombi vehicle by three males. Some of them assaulted Mr Dube and Ms Hlongwane. The items referred to in the charge sheet, including a Motorolla cellular phone, were stolen from them. Ms Hlongwane was raped by two of their assailants and indecently assaulted by one. Neither Mr Dube nor Ms Hlongwane was able to identify their assailants.

[3] The investigating officer, Ms Thobeka Nkosi, through the assistance of the relevant service provider, traced the Motorolla cellular phone that was stolen from Ms Hlongwane to a certain Ms Sihle Lusinga, who was using it. Ms Lusinga testified that all three appellants used to visit the house of her neighbour, Ms Nosithembela Modingi. During January 2006, Ms Lusinga bought a Nokia cellular phone from accused 3. This phone was defective and she handed it back to him about a week later. She was thereafter approached by accused 1, who enquired from her whether she was the person who bought the Nokia cellular phone from accused 3. When she confirmed this, accused 1 told her that she should rather have referred her complaint about the phone to him, because 'he is the one who was selling the phones not accused 3.' He handed her a Motorolla cellular phone in exchange for the Nokia cellular phone which she had given back to accused 3. She used it for about two weeks and then went back to accused 3 with the

complaint that it was 'blocked'. Accused 1 referred her to accused 2, who, according to him, 'knows how to unblock phones.' She went to accused 2, who 'tried to unblock the phone but did not succeed.' She reported back to accused 1, who then referred her to other people who were able to assist her. Ms Modingi also testified. She corroborated Ms Lusinga's evidence that they were neighbours and that all three appellants used to visit her house regularly since they had been friends of her husband, Thomas. The results of DNA testing further implicated appellants 2 and 3 in the commission of the rapes of which they were convicted.

[4] Appellants 1 and 3 raised the defences of alibi. Appellant 1 testified that he was in Mozambique from 15 November 2005 until 23 February 2005, and appellant 3 testified that he was in Mozambique from 16 December 2005 until 15 February 2006. Accused 2 also denied the charges against him. He testified that he and Ms Hlongwane had known each other since 2003, and that they had a love relationship since October 2005 until the day of his arrest on 27 April 2006.

[5] I am of the view that, on the totality of the evidence, the learned regional magistrate correctly inferred, as the only reasonable inference, that the three appellants were the three males about whom Mr Dube and Ms Hlongwane testified. It is true that appellant 1 was not implicated through DNA results, but this was consistent with the undisputed evidence of Ms Hlongwane that she was raped by two of the three males. The involvement of appellant 1 was inferred from the fact of his association with appellants 2 and

3 and the fact of his dealings with the stolen cellular phone. The version of appellant 1 that he had no dealings with Ms Lusinga involving the stolen phone, that he did not know her, that he did not know appellants 2 and 3, and that he never visited Ms Modingi's residence, cannot, in the light of all the evidence, be reasonable possibly true. The record of the proceedings in the regional court shows that Ms Lusinga, Ms Modingi, and Ms Nkosi were undoubtedly credible witnesses and that their evidence was reliable. The denials of the appellants that the three of them used to visit at Ms Modingi's residence were never put to her when she testified.

[6] Mr Miller, who appears for the appellants, submitted that the learned regional magistrate should not have convicted appellant 1 of the crime of rape, but of indecent assault. I agree with this submission. Appellant 1 did not have intercourse with Ms Hlongwane on the proven and accepted facts. The learned regional magistrate misdirected herself in applying the common purpose doctrine to the crime of rape [see: S v Kimberley 2004 2 SACR 38 E, paras 7 – 16]. The first appellant's appeal against his conviction of rape must therefore succeed and such conviction must be substituted for one of indecent assault.

[7] Mr Miller submitted that appellants 1 and 3 should not have been convicted of robbery with aggravating circumstances as defined in s. 1 of the Criminal Procedure Act 51 of 1977. It was submitted that the presence of such aggravating circumstances was not proved beyond reasonable doubt. There is, in my view, no merit in this submission. Mr Dube was hit on the

head with an object, which Ms Hlongwane described as a 'plank'. This assault resulted in swelling of his head. Ms Hlongwane was kicked in the mouth. They were made to lie down while their assailants stole the items from their vehicle. The harm inflicted upon them, in my view, constituted 'grievous bodily harm' within the meaning of s. 1 of the Criminal Procedure Act. Mr Dube was threatened to be killed should he 'try any funny tricks' at the time when his wife had been taken away to be raped. Ms Hlongwane was threatened 'that they were going to blow [her] brains out' and one of the assailants said 'he was going to shoot' her. Such threats, in the light of all the circumstances, were sufficiently closely connected to the theft to regard them as connecting components [see: S v Yolelo 1981 (1) SA 1002 (A)].

[8] Mr Miller submitted that the learned regional magistrate made no finding on the existence of aggravating circumstances prior to convicting the appellants. The elements of the offence of which an accused person is convicted must be established before conviction. I am of the view that the aggravating circumstances taken into account by the learned regional magistrate for purposes of sentencing were indeed established prior to convicting the appellants. The learned regional magistrate did not specifically mention her finding of the presence of such aggravating circumstances when she convicted the appellants of robbery. She did, however, refer to 'count 2'. This count, in terms of the charges put to the appellants, referred to aggravating circumstances as the 'wielding of a firearm and/or similar dangerous weapon'. Any defect in that description was cured by the evidence and the appellants could not possibly have been prejudiced. The legal

representative for the appellants clearly understood that they were convicted of 'robbery with aggravating circumstances' and he conveyed that to each appellant when they testified in mitigation of sentence.

[9] I am accordingly of the view that the learned regional magistrate correctly convicted all the appellants of robbery with aggravating circumstances. The first and third appellants' appeal against their convictions of robbery with aggravating circumstances must therefore fail.

[10] Mr Miller submitted that the Regional Court had no jurisdiction to impose life imprisonment at the time when the crimes of rape under consideration were committed and at the time when the appellants' criminal trial commenced. He submitted that it was therefore not competent for the learned regional magistrate to have imposed sentences of life imprisonment upon them following their convictions of rape. Mr Miller further referred to the limitations upon regional magistrates' sentencing jurisdiction before 31 December 2007, and, relying on certain common law principles and s 35(3)(n) of the Constitution, submitted that the appellants were entitled to the least of the prescribed punishments.

[11] Before its amendment, s 51(1) of the Criminal Law and Procedure Act 105 of 1997 ("the Act") provided that a High Court shall sentence a person to imprisonment for life if it has convicted a person or if the matter had been referred to it under s 52(1) of that Act for sentence after the person concerned had been convicted of an offence referred to in Part 1 of Schedule 2 to the

Act. The now repealed s 52(1) enjoined a Regional Court to stop the proceedings upon conviction and to commit an accused for sentence by a High Court. S. 51(1) was amended and s 52 repealed. With effect from 31 December 2007, a Regional Court may also sentence a person convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life. The newly inserted s 53A specifically empowers a Regional Court to dispose of the matter if it had, prior to 31 December 2007, not committed an accused for sentence by a High Court. The Legislature did not amend the prescribed minimum sentence of life imprisonment that should follow a conviction of certain offences. It merely enjoins regional magistrates no longer to commit an accused person for the imposition of such sentence by a High Court, but instead to impose it once they have convicted an accused person of certain offences. The imposition of the prescribed minimum sentences is, of course, dependent upon the absence of 'substantial and compelling' circumstances.

[12] S 51(1) of the Act as amended prescribes imprisonment for life as the minimum sentence for offences referred to in Part 1 of Schedule 2 to the Act. Insofar as rape is concerned, Part 1 of Schedule 2 in its amended form refers to "[r]ape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007" ("the Sexual Offences Act"). S 3 of this Act reads:

"Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."

Before the amendment, Part 1 of Schedule 2 referred to common law rape, which is the unlawful intentional sexual intercourse with a woman without her consent.

[13] Mr Miller submitted that the appellants were not charged with nor convicted of rape as contemplated in section 3 of the Sexual Offences Act, but of common law rape, and, because the crimes of rape of which they were convicted were no longer referred to in Part 1 of Schedule 2 after its amendment, the learned regional magistrate misdirected herself in sentencing the appellants to imprisonment for life in terms of s 51(1) of the Act. Mr Miller's submission on this issue overlooks the provisions of the Sexual Offences Act and it ignores the Legislature's intention in prescribing minimum sentences and in extending the common law crime of rape beyond the act of sexual intercourse with a woman.

[14] S 68(1)(b) of the Sexual Offences Act *inter alia* repealed the common law relating to the crime of rape. S 3 introduced a statutory crime in its stead. S 69 reads:

"69(1) All criminal proceedings relating to the common law crimes referred to in section 68(1)(b) which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.

(2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68(1)(b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.

(3) Despite the repeal or amendment of any provision of any law by this act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal

or legal proceedings contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended."

[15] The criminal proceedings in this instance should accordingly have been concluded as if the Sexual Offences Act had not been passed. The reference to "[r]ape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007" in Part 1 of Schedule 2 to the Act must accordingly, in my view, be read as a reference to "rape" as it was previously referred to before its amendment and before the Sexual Offences Act had been passed. The amendment in Part 1 of Schedule 2 of the common law crime of rape to the statutory offence created by s 3 of the Sexual Offences Act is an amendment that was brought about by the repeal of the common law relating to the crime of rape in terms of s 68(1)(b) of this Act and the enactment in s 3 of a statutory offence in its stead. The interpretation contended for by Mr Miller leads to absurdity and is inconsistent with the Legislature's intention, before and after the amendment of the Act, of ordaining life imprisonment as the sentence that should "ordinarily and in the absence of weighty justification" [see: S v Malgas 2001 (2) SA 1222 (SCA), at p 1235G] be imposed for rape committed under the circumstances listed in Part 1 of Schedule 2 to the Act. The intention of the Legislature in enacting ss 3 and 68(1)(b) of the Sexual Offences Act is to extend the common law crime of rape beyond the act of sexual intercourse with a woman.

[16] The learned regional magistrate, in my judgment, correctly doubted the sincerity of the remorse expressed by each appellant and correctly found the rapes committed to have been very serious. Giving due weight, however, to

the enormity of the crimes committed by them, the impact thereof on particularly Ms Hlongwane and their child, the public interest in appropriate severe punishments being imposed, the personal circumstances of each appellant, their relative youth, their prospects of rehabilitation, the fact that they are first offenders, and the time spent by each one of them in custody awaiting the finalisation of their criminal trial, I am of the view that the learned regional magistrate misdirected herself in finding an absence of 'substantial and compelling' circumstances that justified the imposition of lesser sentences upon appellants 2 and 3 than the one prescribed for the rapes under consideration. In my judgment, sentences of 25 years imprisonment are appropriate.

[17] The same conclusion cannot, in my judgment, be reached in respect of the offences of robbery with aggravating circumstances of which they were convicted. The robbery was well planned and premeditated. The first appellant's appeal against the sentence imposed upon him pursuant to his conviction of robbery with aggravating circumstances must therefore fail.

[18] I have mentioned that the first appellant's conviction of rape must be substituted for one of indecent assault. A sentence of imprisonment for eight years is, in my judgment, appropriate in respect of this conviction.

MALAN, J

[1] I agree with the judgment of Meyer J.

[2] In the result the appeals of the first and third appellants succeed in part and that of the second appellant succeeds in whole:

A. First Appellant

1. The first appellant's conviction of rape and his sentence of life imprisonment pursuant to such conviction are set aside and there is substituted for it a conviction of indecent assault for which he is sentenced to eight years' imprisonment, which sentence is to run concurrently with his sentence of fifteen years' imprisonment pursuant to his conviction of the offence of robbery with aggravating circumstances.

2. The first appellant's appeal against his conviction of robbery with aggravating circumstances and the sentence imposed upon him pursuant to such conviction is dismissed.

B. Second Appellant

1. The second appellant's sentence of life imprisonment pursuant to his conviction of rape is set aside and there is substituted for it a sentence of imprisonment for 25 years.

2. The second appellant's sentence of fifteen years' imprisonment pursuant to his conviction of robbery with aggravating circumstances is to run concurrently with his sentence of 25 years' imprisonment pursuant to his conviction of rape.

C. Third Appelllant

1. The third appellant's sentence of life imprisonment pursuant to his conviction of rape is set aside and there is substituted for it a sentence of imprisonment for 25 years.
2. The third appellant's sentence of fifteen years' imprisonment pursuant to his conviction of robbery with aggravating circumstances is to run concurrently with his sentence of 25 years' imprisonment pursuant to his conviction of rape.
3. The third appellant's appeal against his conviction of robbery is dismissed.

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F.R. MALAN
JUDGE OF THE HIGH COURT

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P.A. MEYER
JUDGE OF THE HIGH COURT

13 March 2009