REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A466/2009

DATE: 03/12/2010

In the matter between:

DLAMINI, DLAKWAKHE Appellant

and

THE STATE Respondent

J U D G M E N T

MOKGOATLHENG J:

(1) The appellant was convicted in the regional court held in Johannesburg on one count of rape as a perpetrator, and on another count of rape as an accomplice. He was also convicted of kidnapping and robbery with aggravating circumstances. He was sentenced to life imprisonment in respect of the two counts of rape, 3 years imprisonment in respect of kidnapping, and fifteen years in respect of robbery with aggravating circumstances. The appellant now appeals against both his conviction and sentence.

THE COMPLAINANT'S VERSION

(2) The complainant testified in the court-a-quo that on 27 June 2007 she was in a train travelling from Germiston to Denver. She was grabbed, pulled and dragged out of the train at gun point into a waiting room on the platform by four (4) assailants amongst whom was the appellant. She was robbed her of a cellular phone and R100.00 cash, thereafter two (2) of her assailant's including the appellant raped her by forcibly, holding her down to the floor.

(3) The complainant testified that she did not know the appellant prior to the day in question. After the appellant, his co-perpetrator had raped her, a train appeared, as a result the appellant and his co-perpetrator and the two other accomplices ran away. She screamed for help. She was taken to the police station, she made statement, and was taken for medical examination.

(4) Doctor Bhoja testified that he examined the complainant. He observed that her panties was torn, that there stains on her skirt. The complainant was crying and upset at the medical examination. He found bruising on both sides of her face below her eyes and soft tissue injuries to both her thighs. The complainant also complained of body pain, from these injuries he concluded that she was assaulted.

(5) Upon gynaecological examination he found the posterior faucet to be red and inflamed together with a bruised skin. On the posterior faucet he found a small tear at the six o clock area. He also found the fossa navicularis to be red and inflamed. He also found a tear in the complainant's vagina at the nine o clock position. From that he concluded that she was penetrated with a blunt object, for example a penis. These injuries he concluded were consistent with forceful penetration.

(6) Because of the complainant had general body pains, he concluded that she was subjected to a traumatic experience, as there must have been a fair amount of aggression. To sustain a vaginal tear is unusual. The complainant informed him that some of her personal possessions were taken from her.

(7) Gitometse Innocentia Makwela testified that the complainant made a report to her shortly after the incident. She confirmed that the complainant was swollen around her eyes, was hysterical, crying, shivering and was in a dire emotional state. She could not talk to her. The complainant's thighs were red, they looked like those of a person who had been assaulted. The complainant was attempting to take off her clothes as if she wanted to undress herself. She was carrying a small bag, and a black panty which was torn.

(8) She was present when the appellant's torn panty was found in the waiting room. The complainant informed her she was attacked by four black males, but that only two of them penetrated her. She was assaulted and was slapped on her thighs and was forced to open her thighs. At the time when she was raped in turns, her assailants heard the sound of an oncoming train, and ran away.

(9) Constable Mohome testified that on 15 September 2007 he was patrolling in Malvern at about 17:50. At the corner of Mollings and Geldenhuys Streets he was stopped, by the complainant. She informed him and his colleague that she was raped on 27 June 2007, and that just seen one of the rapist in a taxi. The complainant pointed out the appellant who then seated inside a taxi. He arrested the appellant.

THE APPELLANT'S VERSION

(10) The appellant testified that he was alone when he had consensual sexual intercourse with the complainant who is a prostitute. He paid the complainant R50.00 for her services. He owes her R50.00 which the complainant demanded because he had engaged in sexual intercourse with her without a condom.

(11) He knew the complainant as they both travelled by train. He proposed the complainant after meeting her in the train. The complainant told him she was a prostitute and she sold her sexual favours. He and the complainant agreed to have sex. He agreed to pay the complainant R50.00 for sexual intercourse.

(12) The complainant suggested that because he did not use a condom he must pay an extra R50.00. He did not have it consequently, he gave the complainant his phone numbers to contact him and promised to pay her when they met.

(13) He did not rape the complainant, they had consensual sexual intercourse in a waiting room at the train station. After having had sexual intercourse the

complainant left and promised to call him. The day she called, she came with the police, and pointed him out. The police arrested him.

THE ISSUE

(14) The issue in dispute is whether there was consensual sexual intercourse between the appellant and complainant, whether the complainant's evidence as a single witness was credible, reliable and satisfactory in all material respects, and whether the appellant's version was reasonably possibly true.

(15) The court-a-quo found that the factors which were consistent with the complainant's version that there was no consensual sexual intercourse were:

(a) the complainant was forced out of a moving train;

(b) she had visible injuries after the incident;

(c) immediately after being raped she reported the incident to people who were on the platform and thereafter to the police and the doctor who examined her;

(d) she left her torn panty at the scene and which was later discovered by the police; and

(e) there was no relationship between her and the complainant prior to the day in question.

(16) The court-a-quo correctly had regard to the totality of the evidence and correctly found that the complainant's version was corroborated by the evidence of not only Constable Makwela but also of Dr Bhoja who observed a number of injuries sustained by the complainant when he examined her shortly after the incident. This evidence was not disputed. Dr Bhoja and Constable Makwela corroborated the complainant's evidence that her underwear was forcibly torn and removed from her body.

(17) In my view the court-a-quo was correct in finding that the appellant's version was inherently improbable, that it was unlikely that if he owed the complainant who he terms a prostitute the amount of R50.00, and with whom he had consensual intercourse, he would have furnished her with his telephone number to enable her to engage him for the outstanding amount owed.

(18) The appellant's version that he had the consensual sexual intercourse with the complainant was correctly rejected by the court-a-quo as inherently improbable and false beyond reasonable doubt because the objective proven factual evidence and forensic evidence is inconsistent with the

notion that the appellant consented to consensual sexual intercourse. The court-a-quo correctly accepted the complainant's evidence that she was raped by the appellant and his co-perpetrator, that during this ordeal she was also robbed by the appellant of her personal possessions including R100.00 cash and her cell phone. On the second count of rape, the court-a-quo was also correct to convict the appellant as an accomplice in the commission of rape perpetrated by his co-perpetrator.

THE CONVICTION ON KIDNAPPING

(19) The court-a-quo's finding that the appellant and his co-perpetrator, and the two accomplices kidnapped the complainant, thus depriving her of her liberty, and took her to the waiting room on the platform where she was raped is a duplication of convictions. See ***S v Verwey 1968 (4) SA 682 (A) at 687F-688B and 689d-F.***

(20) In my view the court-a-quo misdirected itself in convicting the appellant on the charge of kidnapping. The deprivation of the complainant's liberty was predicated on a continuous intent in pursuance of one criminal transaction to rape the complainant. The commandeering of the complainant from the train into the waiting room was with the continuous criminal intention of executing the rape which could not occur without depriving the complainant of her liberty in that "*specific period*" when the complainant was raped.

(21) In the matter between ***Luvuyo Moneli v The State Case No. 494/07 [2008] ZASCA 50*** delivered on the 1 April 2008 it was held:

"To determine whether there had been an improper duplication of convictions the courts have formulated certain tests. However, these tests are not equally applicable in every case. One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another ***crime S v Grobler and Another 1966 (1) SA 507 (A) at 511G-H; and S v Prins and Another 1966 (3) SA 807 (A)."***

(22) Consequently, the appeal in respect of the conviction of kidnapping is upheld, the appeal against the conviction on count 1, count 2, and count 5 is dismissed.

(23) Concerning sentence it was argued that because the appellant was 27 years old, a first offender, was employed, has two dependants, was in custody for 19 months before sentence, and further that, taking into consideration that offence committed by the appellant is not the type of rape which can be categorized as the worst type in the circumstances, these factors cumulatively should have been taken by the court-a-quo as

constituting substantial and compelling circumstances justifying a sentence other than the prescribed minimum sentence of life imprisonment, consequently it is submitted that the court-a-quo misdirected itself in imposing life sentence on the appellant.

(24) The power of a court to interfere with the sentencing discretion of a trial court is limited. The limits were set out as follows in ***S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220:***

"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 the 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 sentence afresh. In doing so, it assesses sentence 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. It may do so when the disparity between the sentence of 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". It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former, in the latter situation it may substitute the

sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

(25) In my view the courts-a-quo considered the personal circumstances of the appellant the seriousness of the offences, and the interests of society and correctly found that there were no substantial and compelling circumstances as envisaged in ***section 52 of the General Law Amendment Act 105 of 1997.*** In my view the court-a-quo should have ordered that the life sentences imposed on the appellant in respect of count 1 and 2, to run concurrently because the offences arise from the same criminal transaction.

(26) In ***S v Vilakazi 2009 (1) SACR 552 (SCA)*** Nugent JA remarked:

*"[1] Rape is a repulsive crime, it was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'. In **S v Chapman** this court called it a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim' and went on to say that [w]omen in this country….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.

[3] ……The Constitutional Court reminded us in ***S v Dodo****. That punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings 'ought to be treated as ends in themselves, never merely as means to an end'.*

[14] It is only by approaching sentencing under the Act in the manner that was laid down by this court in ***S v Malgas*** *which was said by the Constitutional Court in* ***S v Dodo*** *to be 'undoubtedly correct' that incongruous and disproportionate sentences are capable of being avoided. In that case the Constitutional Court said that the approach laid down in* ***Malgas,*** *and in particular its 'determinative test' for deciding whether a prescribed sentence may be departed from, makes plain that the power of the court to impose a lesser sentence can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross [and thus constitutionally offensive]. That 'determinative test' for when the prescribed sentence may be departed from was expressed as follows in* ***Malgas*** *and it deserves to be emphasised:*

If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that ***Malgas*** *said should be avoided."*

(27) The question is whether the sentence of life imprisonment is unjust and inappropriate having regard to the nature of the rape perpetrated on the complainant? The complainant was attacked by four assailants in a train, she was grabbed and commandeered at gun point out of a moving train into a waiting room. Her leather jacket was removed, her panties were torn from her body, she was made to lie on top of her leather jacket, her hands and feet were held down, she was assaulted on her face and on her thighs and told to open her thighs. She was raped by the appellant and his co-perpetrator without the use of a condom at the risk of the transmission of HIV-AIDS, she was humiliated, sworn at and told she possibly has HIV-AIDS because she has sexual intercourse with Nigerians. She was taunted and told to behave as if she was having sexual intercourse with her husband, and was forced embrace her assailants.

(28) I cannot find fault with the court-a-quo's finding that this was a most vicious rape. The appellant stands unrepentant and remorseless, in my view the chances of rehabilitation are remote if not non existent, due to his lack of contrition and taking responsibility for his conduct. The imposition of life sentence given the circumstances of this case cannot be said to be unjust or inappropriate. See ***S v Ncheche 2005 (2) SACR 386 (W).***

(29) In the premises the appeal on sentence in respect of two (2) counts of rape and the robbery with aggravating circumstances is dismissed. The sentence of 3 years in respect of the conviction on kidnapping is set aside, consequently, the composite sentence reads as follows:

(a) The appellant is sentence to life imprisonment in respect of count 1 and 2; and

(b) 15 years in respect of robbery with aggravating circumstances.

Dated at Johannesburg on the 3rd December 2010.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

I CONCUR

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BADENHORST AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 4th November 2010

DATE OF JUDGMENT: 3rd December 2010

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