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**IN THE SOUTH GAUTENG HIGH COURT JOHANNESBURG**
**(REPUBLIC OF SOUTH AFRICA)**

**CASE NO: 43/1589/04**
**Appeal No: A175/10**

In the matter between:

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| **Dumisani Dladla and Another** | **Appellants** |
| **and** | |
| **The State** | **Respondent** |

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**JUDGMENT**

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Introduction

[1] A young fourteen year old school girl was kidnapped, brutally raped and assaulted by a number of people in the early hours of the morning of 17th June 2004. The two appellants in this matter were part of a group of persons brought before the Regional Court in Soweto and accused of committing various crimes relating to the kidnapping and rape of, and the assaults inflicted upon, the young girl. They were actually accused of committing some 34 crimes. They were duly informed that in terms of *section 51 of the Criminal Law Amendment Act No. 105 of 1977* provision is made for a minimum sentence of life imprisonment should they be convicted on the charge of rape.

[2] The trial lasted some four years and on 21st October 2008 the appellants were convicted on some of the charges.

[3] The first appellant was acquitted on most of the charges and convicted for the following four crimes:

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|---|---|
| Count 1 | Kidnapping |
| Count 3 | Attempted murder |
| Count 7 | Rape |
| Count 12 | Rape |

[4] He was sentenced to six months imprisonment for Count 1, eight years imprisonment for Count 3 and life imprisonment for Counts 7 and 12. The sentences are to run concurrently, resulting in him serving a single sentence of life imprisonment.

[5] The second appellant, too, was acquitted on most of the charges but was convicted for the following three crimes:

| | |
|---|---|
| Count 1 | Kidnapping |
| Count 9 | Rape |
| Count 14 | Rape |

[6] He was sentenced to six months imprisonment for Count 1, and life imprisonment for Counts 9 and 14. In his case, too, the sentences are to run concurrently, resulting in him serving a single sentence of life imprisonment.

[7] Both appellants are aggrieved by their conviction and sentence and take advantage of the right to an automatic appeal, as provided for in terms of

*section 309 (a)(ii) of Criminal Procedure Act, No 51 of 1977*, to challenge the conviction and the sentence imposed on them.

The evidence common to both appellants

[8] On 16th June 2004 the young girl, together with her brother and some friends, was returning home after attending a "uniform party" at the Hector Peterson Museum in Soweto. After crossing the road a motor vehicle, properly described as a Venture, appeared on the road travelling towards them. The young girl, her brother and friends sensed danger and decided to run away. They ran into the yards of nearby properties. Two young men alighted from the Venture, found the young girl hiding behind some plants, took her out into the street and slapped her with open hands. One of these young men kicked her. She was then forced into the vehicle. There were other persons in the vehicle. All in all there were approximately eight people in the vehicle. The vehicle took off with the abducted young girl inside.

[9] The vehicle travelled for a while. It stopped when some occupants got out and then went back in. As they got back into the vehicle and drove off, the back door opened and the young girl tried to escape by throwing herself on the ground, resulting in her suffering bruises to her knees. The vehicle then stopped and some of the occupants got out and carried her back into the vehicle. In the vehicle she was forced to lie flat on her stomach on the floor to the back-seat while the other occupants of the vehicle sat on the seat and placed their feet on her back. Some of them kicked and stamped on her. She

was searched for a cell phone, her private parts were fondled, her underpants were torn-off, and some occupants put their fingers in her vagina. She was also verbally abused. During this encounter she was crying and screaming. The driver then stopped the vehicle, got out, came to the left hand side of the vehicle, opened the door, ordered her to keep quiet and said *"these young men will kill you, you whore."*

[10] The driver went back to his seat and began driving the vehicle, which he finally stopped at a place called Five Roses Park. The occupants took her out of the vehicle and dragged her on to some grass. She was forced to lie on her back. The driver of the vehicle began raping her. When she tried to look at his face one of the assailants stepped on her face and told her not to look. After the driver finished raping her she was moved a few metres to an area where the lighting was poorer. Thereafter the other assailants took their turn to rape her. One of the assailants forced her to perform oral sex on him. As this was progressing, one of the other assailants raped her in the anus. All this time some of them continued to hurl verbal abuse at her. After they completed raping and assaulting her they left and one of the assailants shouted that they would *"shoot this dog and throw it inside the water"*.

[11] She then walked towards her home. Next to her home she saw a police vehicle. She went into the neighbour's house and managed to find a T-shirt to wear. She then went to the police to inform them of her ordeal. She was taken to Baragwaneth Hospital where she was examined by a nurse. Samples of the contents of her vagina were taken for DNA analysis.

The evidence against the first appellant

The young girl

[12] The young girl testified in camera. An attempt was made to bring her to the court room where the accused were seated so that she could identify some of them, but upon entering the court room she broke down and had to be removed from the court room. This indicated how traumatic the entire episode had been for her. She was only able to provide a description of the driver of the vehicle. She could not identify the rest of the men involved in the commission of the offence as she was raped in a dark place.

[14] However, during her testimony, she was able to say that the driver of the vehicle was light in complexion and had protruding ears. This was also the description she gave to the investigating officer at the time she was interviewed, which was more than three years before she testified.

[15] She also mentioned that the vehicle had the words "*Ma Willy's or Willy's Driving School*" printed on its side.

The brother of the young girl

[16] The brother of the young girl testified that after they left the "*uniform party*" and while they were walking on the road they saw a white vehicle that was a Toyota Venture travelling towards them. The Venture first passed them

and then made a U-turn. He immediately told his sister and her friends to run as he sensed danger. They all ran.

[17] He also testified that "*Willy's Driving School*" was printed on the side of the Venture.

[18] Sometime before he testified, he was asked to attend an identity parade held by the police who had arrested certain persons in connection with the crimes committed in this matter. The identity parade took place at the police station. At this identity parade he pointed out the first appellant as one of the occupants of the Venture. The identity parade was conducted in the presence of the legal representatives of all the accused and none of them raised any objections to the procedure utilised.

[19] He testified that the appellant was light in complexion and short, and that he recognised him by his ears as his ears are slightly open.

[20] He admitted to having consumed a moderate amount of liquor during the evening at the party, prior to the time when the group he was with had encountered the Venture. He denied that he was heavily drunk.

[21] The following aspects of his testimony are crucial:

*"And then, what happened? – The Venture chased me and it knocked me down."*[1]

*"What happened then? – When I stood up, there was this young man who uttered the words "shoot this dog, shoot this dog".*
*Did you see the man who uttered those words? – Yes he was protruding through the window.* [2]

*The man that was shouting through the window shoot that dog, do you see him in court today? – Yes he is present.*
*Can you point him to us please? – He is seated at the corner."* [3]
(Emphasis added).

[22] It is common cause that the person who was seated in the corner is the first appellant. However, to make absolutely sure as to which of the six accused he was referring to, the Magistrate asked him to repeat his answer by referring to the numbers placed in the dock in front of each of the accused. This is recorded in the following terms:

"Court: *Back to the question by the prosecutor, can you point him? – Accused 1.* [4]

[23] Accused 1, it is common cause, is the first appellant.

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[1] Record, p 188, lines 3-4
[2] Record, p 189, lines 7-8
[3] Record, p 189, lines 15-17
[4] Record, p 190, lines 2-3

[24] During cross-examination he reiterated his version of the facts. The version was not discredited by any inconsistencies or ambiguities on his part. The cross-examination did not damage his credibility nor did it raise any serious concerns about the reliability of his evidence.

The investigating officer: Inspector Ramutzule

[25] The investigating officer, one Inspector Ramutzule, testified that he arrested the first appellant after receiving a tip-off that he would find one of the perpetrators of the crimes at the workplace of a firm, operating under the name of "*Willy's Driving School*", in Florida. He was clear in his mind about the person he was looking for, as he was given a description of the driver of the vehicle by the young girl.

[26] He went to the premises of Willy's Driving School on 10th August 2004. Upon his arrival at the said premises, the first appellant saw him and immediately began running away without even being confronted by Inspector Ramutzule. He ran into the nearby bushes. A search of the area was conducted and he was found hiding in the bushes. He fitted the description of the driver of the Venture given to him by the young girl. He was immediately arrested and later charged.

[27] There was no real or substantial challenge to the evidence of Inspector Ramutzule.

The evidence on behalf of the first appellant

The first appellant

]28] The first appellant denied committing any of the crimes for which he was charged. He admitted to having driven a Venture on the day the crimes were committed, but said that he drove a green one and not a white one as stated by the young girl and her brother. More importantly, he did so in a place far away from where the crimes were committed. His testimony, on this aspect, is captured in the following terms:

> *"Were you working that day of the 16th? – I can say I was working because I work as a driver and I was driving my grandfather the whole day on that day.*
>
> *Is your grandfather a client of Willy's Driving School? – No.*
>
> *Does he work for Willy's Driving School? – He is the owner of Willy's Driving School.*
>
> *Are you allowed to use the vehicles of Willy's driving school for your own private use when you are not working? – yes if we are to request, they will give us the permission to do so.*
>
> *At the party at Protea where you went to, was it only family there or were there friends as well? – Not only family members, there were also friends who attended the party.*
>
> *Your friends? – Not my friends, it was a very big party, it was my aunt's friend who attended the party.*
>
> *You testified sir that at around 2 o'clock you left the party, you informed the people that wanted transport from your. – Yes.*

*Do you know these people prior to that evening? – Yes , I did.*

*Before you dropped them off one by one, did you drive around? – No.*

*And you testified sir that the first person you dropped off was, who was the first person you dropped off? – Nomsa.*

*Where does Nomsa live? – At Mlangeni Street but I do not know the address.*

*Which suburb is that? – At Mfulo.*

*How far is that from Protea where the party was? – It is very far, you have to pass different locations before you reach Mfolo.*

*You say different location, like? – Like Mapetalap, then you go to Rockville and after Whiteseed, after Whiteseed you are now at Mfolo.*

*You dropped off all your passengers and you and Mandela parked the car. – Yes.*

*And you went home. – Yes.*

*What time did you arrive home? – After 2.*

*You said you went to bed and you slept. – Yes.*

*Who else stays with you and Mandela? -- I am staying with my other aunts and my other cousins."*[5]

[29] According to him, the white Venture which does exist and which belongs to the business of his grandfather, i.e. Willy's Driving School, was not on the road on the 16th June 2004 as it was at the panel-beater undergoing some repairs.

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[5] Record, p 270 line 15 – p 271

[30] That constitutes the sum total of his evidence.

[31] He did not deal with the evidence of Inspector Ramutzule at all, and the way he chose to deal with the evidence of the young girl and her brother was to put forward a version that was completely irreconcilable with their respective versions. His version was that he was nowhere near the incident. Thus, he maintained, he was innocent of the charges.

Other witnesses

[32] Two other witnesses, one of whom was his cousin, were called to corroborate his version. They corroborated his version that he attended a party with them at Mfolo on the night of 16 June 2004, and that at the end of the party he went home to sleep.

The evidence against the second appellant

[33] The evidence against the second appellant was that his DNA, which was acquired from a blood sample taken from him, matched the DNA of the semen extracted from the young girl's vagina after she was raped. The evidence presented to the court dealt with the DNA samples that were taken from the young girl and from him, as well as the conclusion drawn from the analysis of these samples.

[34] This evidence was given:

[34.1] by the nurse, one Sister Sally, who was the first to examine the young girl after the rapes and assaults, and who took the swabs from the young girl, which she appropriately sealed and sent to the forensic laboratory for analysis; and,

[34.2] by three analysts at the laboratory, *viz,* one Tania Roberts, one Michelle Fredericka van As, and one Monica de Necker.

[35] The second appellant challenged the reliability of the DNA analysis, claiming that the blood sample taken from him was compromised and that the sample was mislabelled.

[36] He claims that when the blood sample was being taken from him, the needle used to extract the blood broke. He also raised questions about how the sample was treated after it was taken from him. He claims that, as no evidence was led on the collection of the blood sample and on the breaking of the seal of the bottle containing the sample, He contended that it cannot be said without any doubt that the blood sample is his.

The Judgment of the Court *a quo*

Conviction

[37] The learned magistrate carefully analysed all the evidence before him, considered all the arguments presented, and in a well reasoned judgement

concluded that the two appellants were guilty of the charges referred to above.

[38] As regards the first appellant he stated:

> "*It is highly if not totally improbable that the description of accused 1 made by* (the young girl) *and Thabiso* (the brother of the young girl) *as being the driver of the said Venture, could coincidentally go to an extent of matching the car used in the commission of the offence as well as match the place of employment of accused 1, being driving school with the markings Willy's Driving School.*"[6]

And:

> "*The accused 1 in rebutting the testimony of* (the young girl) *and Thabiso on identity, one would have expected him to call the owner of the driving school as the man being in charge of the green Venture, in which he alleges that he was driving on the night in question to come and confirm his version.*
>
> *Furthermore the court was going to look into the matter with a different eye, if there was oral or documentary proof from the panelbeater of any other person, to come and indicate that indeed the white Venture marked Ma Willy's or Willy's Driving*

[6] Judgment, p 349, lines 17-21

*School was at the panelbeater at the time stated by the accused so as to displace the connection of accused 1's description of being inside or of driving the white Venture as stipulated by the state witnesses."* [7]

[39] He found the evidence of the young girl, her brother and Sello to be "*not only honest or credible*, (but) *also reliable*"[8], while he found the first appellant to be a poor witness and that his version was in all probability "*false and full of improbabilities.*"[9] These findings are not inconsistent with the evidence presented before the learned magistrate.

[40] In my view that learned magistrate cannot be faulted for finding the first appellant guilty of the crimes he was charged for. As regards his finding that the first appellant was a poor witness there is nothing before this Court to say that that finding was incorrect. It is trite that the presiding officer who has an opportunity to assess the evidence of a witness, with the benefit of observing his demeanour, is best placed to make a finding on credibility. Unless that finding is so incredulous as to be outside the parameters of reason, an appeal court should not interfere with such a finding. In any event, I find myself in agreement with the learned magistrate that the totality of the evidence presented against the first appellant proved beyond reasonable doubt that the first appellant is guilty of the crimes he was charged for. The learned magistrate was correct to reject his alibi evidence in the light of the evidence presented by the prosecution. The first appellant did not deal with, let alone

[7] Judgment, p 349, lines 17-21
[8] Judgment, p 351, lines 12-22
[9] Judgment, p 352, line 7

contradict, the evidence of Inspector Ramutzule or the evidence of the brother of the young girl. It will be remembered that the brother had seen him as the driver of the Venture on the 17th June and that he pointed the first appellant out at the identification parade. Hence, the finding that the evidence of the first appellant cannot reasonably be true is, without doubt, correct.

[41] The case against the second appellant was based on the forensic evidence concerning the matching of his DNA with the DNA analysis of the semen extracted from the young girl's vagina after she was brutally raped. The second appellant did not challenge the DNA analysis of the semen, but claimed that the DNA analysis of the blood sample was not derived from the blood sample taken from him after his arrest. Thus, he attempted to discredit the evidence of Sister Sally, Tania Roberts, Michele Fredericka van As and Monica de Necker by focussing only on the procedures that were followed when the blood sample was taken from him, transported to the laboratory and analysed there. But there is nothing in their evidence, or in any of the other evidence before court, to suggest that the procedures they followed were irregular or resulted, in any way, in the contamination of the blood sample taken from him. The second appellant's challenge was not based on any proven fact. Their collective evidence put the veracity of the DNA analysis beyond the realm of any doubt.

[42] Accordingly, the second appellant was correctly convicted of the crimes he was charged for.

Sentence

[43] The crimes of rape for which the appellants were convicted carry a minimum of a life sentence in terms of s 51 of the *Criminal Law Amendment Act No 105 of 1997* unless compelling or substantial factors are present to detract from the minimum sentence.

[44] It was argued on behalf of both appellants that this was the first time they were convicted, that they were both very young and these two facts constituted compelling reasons not to impose the minimum sentences.

[45] These facts, however, need to be placed alongside other facts such as:

[45.1] the age of the young girl;

[45.2] the brutality of the crimes committed by the appellants and their co-assailants;

[45.3] the fact that rape is a particularly heinous crime which has no place in a society that respects the dignity and humanity of women;

[45.4] the fact that the two appellants were part of a gang of eight persons that brutally raped and assaulted the young girl;

[45.5] the fact that the two appellants did not show any remorse for their crimes;

[45.6] the fact that they did not assist the cause of justice by helping the police in their work to bring their co-perpetrators to justice;

[45.7] the fact that the young girl has been permanently damaged by the trauma they and their co-assailants inflicted upon her,

[46] I am in agreement with the sentiments of the full bench of the Cape Provincial Division which is expressed, thus:

> *"Rape is regarded by society as one of the most heinous of crimes and rightly so. A rapist does not murder his victims. He murders her self-respect and destroys her feelings of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate worse than the loss of life."* [10]

[47] This view is in line with the approach of the Supreme Court of Appeal (the SCA), which has informed the public that the courts will deal firmly with anyone convicted of this heinous crime. In the words of the SCA:

> *"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim.*

[10] *S v C* 1996 (2) SACR 181 (C) at 186d-e.

*The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.*

*Women in this country are entitled to the protection of these 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."* [11]

[48] The appropriate sentence that is to be imposed in a particular case is a matter that falls particularly within the discretion of the trial court. An appellate court is normally loathe to interfere with the decision of the trial court save in certain circumscribed and defined circumstances. In the present case, the sentences imposed on both appellants are far from inappropriate. In their case they were guilty of not only raping the young girl but of being part of a gang that brutally assaulted the young girl. The sentences imposed are not different from what this court would have imposed. Any lesser sentence would not serve the interests of justice.

[49] Accordingly, the following order is made:

The appeals of both appellants are dismissed.

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[11] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5a-d.

Vally AJ

I agree
Horn J

Counsel for the appellants: Unknown
Counsel for the Respondent: Unknown
Date of hearing: 30 November 2011
Date of judgment: 30 November 2011