REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LOCAL DIVISION JOHANNESBURG)

CASE NO: A99/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

7 MARCH 2014 **FHD VAN OOSTEN**

In the matter between

SAMUEL NDABA **FIRST APPELLANT**
ANDILE KHUMALO **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

VAN OOSTEN J *et* **MOSIKATSANA AJ:**

[1] The appellants were convicted in Vosloorus regional court as follows: appellant 1 on two counts of rape (counts 1 and 2) and appellant 2 on count 2 only. The charges arose from the same incident. Both appellants were remitted to this court for sentence, pursuant to the provisions of s 52(1)(b) of Act 105 of 1997 (the Act). The matter came before Fevrier AJ, who confirmed the conviction being in accordance with justice in terms of s 52(3)(e) of the Act and having considered pre-sentence

reports in respect of both appellants, as well as the evidence led by the State, sentenced both appellants to life imprisonment. Both appellants were declared unfit to possess a firearm. The appeal is directed against conviction and sentence and is with leave of the court a quo.

[2] First, the conviction. The disputes in this matter are relatively narrow: it is common cause that the complainants and the appellants were in each other's company some time during the evening of the day of the incident. Appellant 1 denied having had sexual intercourse with the complainants whereas appellant 2 corroborated the version of the complainants that they were raped by appellant 1. Appellant 2 although admitting having been present at all relevant times, raised a defence of coercion to which I shall revert.

[3] It is necessary to briefly refer to the evidence of the two complainants (referred to in counts 1 and 2) who were the only witnesses to testify for the State. They were young girls of children of […..] years and [….] years old respectively, when they testified. The incident from which the charges arose occurred on 1 May 2004, at approximately 18h00, when the complainants were walking together on their way to Windmill Park. According to their evidence, they met four males including the appellants. The complainants knew the appellants as they had grown up in the area where the appellants lived. They noticed appellant 1 who approached them. They tried to flee into a nearby house but the door was locked.

[4] Appellant 1 caught up with the complainants. He produced a firearm. Both appellants took them to an open veld. Appellant 1 ordered appellant 2 to have sexual intercourse with first complainant and he proceeded to rape the second complainant. Appellant 1 and the second complainant remained behind whilst appellant 2 and first complainant walked further. Appellant 1 threatened to assault the second complainant and proceeded to rape her. The second appellant who was holding first complainant's arm continued walking and along the way they waited for the second complainant and appellant 1 to catch up with them. The appellants took the complainants to a shebeen. Before entering the shebeen, appellant 1 hid what they perceived to be two firearms in the veld. They entered the shebeen, ordered and consumed liquor, and stayed there for a short while.

[5] No alarm was raised as the complainants were afraid of the appellants. Appellant 2 forcefully pulled the first complainant out of the shebeen. Appellant 1 joined them outside. The second complainant remained in the shebeen with the other ladies. The two appellants forced the first complainant to walk further with them. As they were walking, appellant 1 took out money after fetching the two firearms from where he had hidden them. He handed money to appellant 2 and instructed him to go back to the shebeen to buy liquor for them. Appellant 2 obliged. Appellant 1 tripped the first complainant and she fell. He got on top of her but did nothing as just then appellant 2 arrived with the liquor he had bought at the shebeen. Appellant 1 got off the first complainant and told appellant 2 to have sexual intercourse with her. Appellant 1 grabbed her by the legs, took off her trousers and underwear and appellant 2 proceeded to rape her while appellant 1 was holding her legs. Appellant 1 then took his turn and raped her. The appellants then discussed the likelihood of the likelihood of their arrest and the complainant reporting the incident to her mother which prompted appellant 1 to suggest that they should kill her and cover her body with cow dung. Appellant 1 put a firearm against her head and offered to pay her R100 should she not report the incident to her mother. He threatened that their shack would be burned if she told her mother. It was late at night and she and appellant 2 proceeded to his house, where they spent the night, as she was afraid to go home at that time of the night. The next morning she pretended to appellant 2 that she was going to fetch the promised money from appellant 1 but instead reported the rape at the police station. Appellant 2 and the first complainant had previously been in a relationship during which they had consensual sexual intercourse, but that relationship had ended.

[6] Appellant 1, in the meanwhile, returned to the shebeen. The second complainant was still there on his arrival. He bought liquor and sat down some distance away from the complainant. Nothing further happened and appellant 1 left some time later to go home. Both complainants reported the rapes to the police and they were subsequently medically examined, on 2 and 5 May 2004, respectively. The clinical findings and results obtained were recorded on Form J88 which was handed in by consent. The conclusion is recorded as ‘There is no obvious evidence of forced or violent vaginal intercourse, but rape cannot be ruled out’.

[7] Appellant 1's version of the events was that he went to the shebeen at 22h00 that evening to buy liquor where he 'found' appellant 2 sitting with the two complainants. He however, joined another table and they started drinking. Appellant 2 came up to him and requested beer which he gave to him. Appellant 2 returned to the table where he was sitting with the complainants. Shortly thereafter he returned again asking for beer, this time for the complainants, which appellant 1 gave to him. Appellant 2 left with the second complainant and he shortly thereafter also left. Appellant 1's version was improbable, against the weight of the evidence, including the version of appellant 2, and correctly rejected as false by the trial court.

[8] Appellant 2's defence was that appellant 1 'instructed' him to have sexual intercourse with the first complainant. He told appellant 1 that he was afraid of getting arrested and what his mother would say of his arrest. He 'took' the first complainant and walked with her leaving appellant 1 and the second complainant behind. They waited for appellant 1 to join them but eventually he decided to return to them as 'it may happen that maybe they have decided to dodge us'. On their way they met appellant 1 and the second complainant and they all went to the shebeen. Appellant 1 was armed with a firearm. They eventually left the shebeen and appellant 1 told him to return to the shebeen and buy liquor which he did. On his return appellant 1 was with the first complainant and she was crying. Appellant 1 'said' he should have intercourse with the first complainant. He told appellant 1 that he was scared. Appellant 1 took out his firearm, cocked it, slapped the first complainant, told appellant 2 that he was mad, started taking off the first complainant's clothing and 'instructed' him to have sexual intercourse with her. Appellant 2 then got on top of her and made up and down movements simulating sexual intercourse. Appellant 1 told him that he was wasting his time and proceeded to rape her.

[9] Appellant 2 corroborated the version of the two complainants in all material aspects, except in so far as he attempted to minimise his role and exculpate himself. He however, directly contradicted appellant 1's version. Appellant 2's denial of his participation in the gang rape was effectively refuted by first complainant who was adamant that he had also raped her. Appellant 2's denial was nothing but a figment

of his imagination and a transparent attempt to exculpate himself. It was rightly rejected as such by the trial court.

[10] The Regional Magistrate was mindful of the cautionary rules applicable to the consideration of the evidence of young children (see *R v Manda* 1951 (3) SA 158 (A) at 163C-E; *Viveiros v S* 2000 (2) All SA 86 (SCA). He accepted their version as credible and correctly found that they corroborated each other on all material aspects. No motive to falsely incriminate the appellants can be ascribed to them. The evidence against the accused was overwhelming. No reason exists for disturbing any of the findings made by the trial court (see *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15). It follows that the appeal against conviction must fail.

[11] As to the sentencing, s 51(1) of the Criminal Law Amendment Act 105 of 1997 applies. A sentence of life imprisonment was mandatory unless substantial and compelling circumstances, justifying the imposition of a lesser sentence, existed. The court a quo duly considered the nature of the offence involving the rape of young girls which the learned judge held was a horrendous crime perpetrated by predators who abuse and rape innocent and defenceless children. No circumstances justifying a lesser sentence was found and the ultimate sentence was imposed (see *S v Matyityi* 2011 (1) SACR 40 (SCA).

[12] It is trite that the imposition of sentence falls solely within the discretion of the trial court. The powers of the court of appeal to interfere with the sentences imposed, is limited to instances where the sentencing court did not exercise its discretion reasonably or the sentence is shockingly inappropriate or disproportionate. The court a quo, in my view, exercised its discretion properly and no misdirections occurred (see *S v Obisi* 2005 (2) SACR 350 (W)).

[13] It is indisputable that rape is a most vicious crime that shows no regard for the integrity and feelings of the victim. In the *locus classicus* concerning rape, *S v Chapman* 1997 (3) SA 341 (SCA) 344, it was put thus:

‘Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization…The courts are under a duty to send a clear message to the accused,

to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade these rights.'

In *S v N* 2008 (2) SACR 135 (SCA) para 30 Maya JA stated:

'The sense of outrage justifiably roused by the offence of rape in the right thinking members of a South African society in which sexual violence is so endemic and hardly shows any sign of abating, must in my view, be a critical factor in the imposition of a suitable sentence.'

And, finally, in *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577g-I, Bosielo JA added to the judicial outcry against rape as follows:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

In *S v Vilakazi* 2009 (1) SACR 552 (SCA) and *S v Mahomatsa* 2002 (2) SACR 435 (SCA) it was held that life imprisonment should be reserved for the most serious cases of rape. The present matter in my view falls into this category. Lastly, with reference to the interest of society, Nugent JA, in *S v Schwartz* 2004 (2) SACR 370 (SCA) 379b, stated:

'I have pointed out that in the case of serious crimes, societies' sense of outrage and the deterrence of the offender and other potential offenders deserve considerable weight.'

The sentence is neither shockingly severe nor disproportionate to the severity of the offences of which the appellants were convicted.

[14] For all the above reasons there is no merit in the appeal and it must fail.

[15] In the result the appeal against the conviction and the sentence in respect of both appellants is dismissed.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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T MOSIKATSANA
ACTING JUDGE OF THE HIGH COURT

I agree.

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R MOKGOATHLENG
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANTS	***ADV J HENZEN-DU TOIT***
COUNSEL FOR RESPONDENT	***ADV CL SMIT***
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