



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A217/16

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

30 January 2017

[Signature]
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In the matter between:

MOTSHABI, STEVEN

Appellant

and

THE STATE

Respondent

JUDGMENT

MUDAU J:

[1] This appeal is against conviction as well as sentence. The appellant and his co-accused were convicted and sentenced by the Johannesburg regional court as follows: on count 1: robbery with aggravating circumstances, as contemplated in s 1 of the Criminal Procedure Act 51 of 1977 (broken bottle used), to 15 years' imprisonment (his co-accused only), and on count 2: rape, to life imprisonment

each. Effectively, both were to serve life terms of imprisonment. In this case the provisions of s 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997 were applicable. S 51 (1) provides for mandatory life imprisonment where the victim was raped more than once whether by the accused or any co-perpetrator or accomplice; or by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy.

[2] The facts which gave rise to this matter can be summarised as follows: In the early evening of 5 December 2013, the complainant aged 24, had just disembarked at the Johannesburg station from a train when she met the appellant and his co-accused. She had travelled from Cape Town where she had been for a visit. She asked them for directions to a taxi that would have taken her to Natalspruit taxi rank, where she would have taken a local taxi to her home. The two men volunteered to show her where to find a taxi. She accepted their offer. She was at that time pregnant with her boyfriend's baby. She had with her, a trolley case which contained her clothes as well as two cell phones and some R600-00 cash.

[3] They walked for quite some time until they reached an abandoned building in an area unfamiliar to her. After being taken inside, the appellant went out and fetched a "sponge". The two men informed her in no uncertain terms that she was going to spend the night with them. She was forced to lie down on the "sponge". According to the complainant one of them, the co-accused, broke a bottle with which she was threatened. The appellant's co-accused removed her pants and panties after which he proceeded to rape her without the use of a condom by inserting his penis into her vagina whilst holding the broken bottle against her neck with the appellant keeping guard. Thereafter, the appellant also raped her in the same manner and did not use a condom.

[4] The co-accused took her jacket, searched the pockets and took her two cell phones and the R600-00 she had in cash. She was kept against her will for the entire night without sleep after they had permitted her to put on her clothing. Early the next morning, the co-accused took her bag and left the premises. After he had left, the appellant ordered her to undress after threatening her with the broken bottle and raped her, as before for the second time again without the use of a condom.

After he finished raping her, she pleaded with the appellant to let her go with an undertaking that she will not report the incident. He eventually agreed and released her. He gave her directions to the train station whilst following her at a safe distance after which he turned and fled.

[5] She reported the incident to the first man she met at the station and later at the Jeppe police station. Constable Manashwe, who took the complaint's statement, confirmed that she was untidy, dirty and was crying when she made the statement. The complainant took the police to the derelict house where the incident occurred. It was there that the appellant was found asleep and arrested by Sgt Molomo. Later the same day, the co-accused was traced to a tavern where he too, was arrested with the help of the appellant.

[6] Dr Dunga, who examined the complainant at the Hillbrow Clinic and completed the J88 report, testified that the complainant had sustained a fresh tear of the posterior forchette consistent with forced vaginal penetration.

[7] The appellant's defence was that he had consensual sex with complaint. It was his testimony that on 5 December 2013 at 22:00 hours he went to a tavern where he found his co-accused in the company of the complainant. The co-accused introduced the complainant as his girlfriend. There they consumed alcohol whereas the complainant had none. After midnight when the tavern closed, his co-accused asked him for a place to spend the night with his girlfriend. The appellant took them to an abandoned house in which he resided. There he prepared the bed (sponge) after which all three of them went to bed with his co-accused between him and the complainant. As he had consumed alcohol, he immediately passed out.

[8] Early the next morning, he woke up to the sound of their voices. His co-accused excused himself as he had an errand to run but promised that he would be back. He too, left to fetch water from a nearby service station which he heated after making a fire. He prepared the complainant's bath and she took a bath. Thereafter, he organised food which they shared as they were both hungry. It was whilst eating, that he proposed to have sex with complainant to which she agreed provided he did not inform his co-accused what they did. By then it was after 9am. Once they were

finished having sex, with his co-accused not returning, they agreed to go and look for his co-accused at the tavern they had been to the previous night. The complainant changed her mind and said she wanted to go to Natalspruit instead.

[9] However, in his testimony, the co-accused also implicated the appellant, by testifying that he raped her whilst she was crying after being threatened with a broken bottle. He tried to intervene but the appellant threatened him with the broken bottle as well. It was only after she had been raped by the appellant that he embraced her, in order to comfort her. In the process he got aroused and had sex with her but with her consent whilst the appellant had fallen asleep. When he left the two together later that morning, he was going to sell her cell-phone in order to buy food. He had met the complainant the night before at the train station where he assists commuters by carrying their luggage. The complainant had just arrived from Cape Town but had no place to sleep. He had offered her a place to sleep but they first had to go to the tavern for drinks where they were later joined by the appellant.

[10] The trial court, having cautioned itself that the complainant was a single witness, found her a satisfactory witness who, in its view, had no reason to falsely implicate the appellant and his co-accused. It found her version credible and rejected the appellant's evidence and that of the co-accused to the extent contradicted by the State's version on the basis that it was so improbable that it could not reasonably possibly be true.

[11] The question for decision by this court on appeal is whether the State established the appellant's guilt beyond reasonable doubt. As was reiterated in **S v Chabalala**¹ that the proper approach to assessing evidence 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'*.

¹ S v Chabalala 2003 (1) SACR 134 (SCA) at para 15.

[12] The complainant's version of the rape was, as the trial court pointed out not only clear but straightforward. Her version was materially corroborated by that of the police officers who testified regarding her appearance and emotional state after the incident. This is in stark contrast to appellant's version that she had bathed that morning. The version by the appellant regarding the incident is inherently improbable. Besides, the co-accused corroborated her version that the appellant raped her. The complainant was unshaken in cross-examination. The probabilities that the complainant would have consensual sex with both men, who were strangers, whilst knowing that she was pregnant by another man, given the circumstances, are remote. Counsel for the appellant was constrained to concede in written submissions before us and in argument that the evidence is overwhelming that the sexual intercourse between the complainant and the appellant was without consent. I am therefore satisfied that the State proved the appellant's guilt beyond reasonable doubt. The appeal against conviction lacks merit. There is, accordingly, no basis to disturb the trial court's finding of guilt.

[13] I now turn to deal with the appeal on sentence. It is an established approach in our law that this court's power to interfere with the sentence is limited as the passing of punishment lies in the discretion of the sentencing court. A court of appeal may not simply substitute a sentence because it prefers it and will be entitled to interfere only if the sentencing court materially misdirected itself or if the disparity between its sentence and the one which this court would have imposed had it been the trial court's sentence is 'shocking', 'startling' or 'disturbingly inappropriate' (see **S v Malgas²**).

[14] Unfortunately, as it is often the position in cases of this nature, no evidence of the true extent of the mental and psychological harm and the degree of scarring sustained by the complainant was led, as she could not be traced for pre-sentencing proceedings. It is nonetheless not doubtful that the complainant must have been seriously traumatised by the sexual assault in this case as she was still crying when she reported the incident to the police hours later that day. The appellant and his co-accused had taken advantage of a woman who was desperate to find a taxi and

² S v Malgas 2001 (1) SACR 469 (SCA) at 478F-G.

lured her to a secluded building to carry out their wicked deeds. They humiliated her by their conduct. By raping the complainant without using condoms, they not only exposed the complainant to the risks of sexually transmitted diseases, but also that of her unborn child. One cannot imagine a worse form of rape than which the complainant endured.

[15] Against these aggravating factors, the sentencing court weighed the appellant's personal circumstances – he was 32 years of age, a first offender, unmarried and a father to a 10 year old who lived in the care and custody of the biological mother. He had a matric qualification, was gainfully employed as a security guard earning R100-00 a day. The appellant had already lost his biological parents who had lived separately and he was in part, raised by his uncle. The appellant and his co-accused were in custody for approximately two years by the time of sentencing.

[16] The crime committed by the appellant must be viewed within the following context, eloquently outlined by Mahomed CJ, Van Heerden *et Olivier* JJA in **S v Chapman**³:

'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 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.'

³ S v Chapman 1997 (2) SACR 3 (SCA) at para 5A-C.

[17] The approach by the learned justices of the Supreme Court of Appeal was echoed by Pillay JA in **S v Nkunkuma and Others**⁴ stating that “Rape must rank as the worst invasive and dehumanising violation of human rights” (see also, **Vilakazi v The State**⁵). Rape and an offence such as robbery have become serious social problems. It is not difficult to take judicial notice of this phenomenon in the light of the number of such cases dealt with by the regional courts, the High Courts and those which eventually end up in the Supreme Court of Appeal. Offences like this in which innocent women are accosted in public places and streets, robbed and raped are alarmingly common-place, and self-evidently particularly serious.

[18] Regarding statutory mandatory minimum sentences, Ponnann JA, in **S v Matyityi**⁶, stated:

‘Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as ‘relative youthfulness’ or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion

⁴ S v Nkunkuma and Others 2014 (2) SACR 168 (SCA) at para 17.

⁵ Vilakazi v The State 2009 (1) SACR 552 (SCA).

⁶ S v Matyityi 2011 (1) SACR 40 (SCA) at para 23.

of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

[19] In this case, the predatory conduct of the appellant and his co accused were predominantly the warped assertion of, and abuse of, male power over an innocent, defenceless woman desperate for help. The appellant and his co-accused deceptively pretended to care for the complainant by showing her directions but then proceeded to rape her overnight cold-heartedly and brutally after threatening her with a broken bottle. The appellant, throughout his trial, never displayed any genuine remorse. Neither did he express any remorse to the probation officer after his conviction in the face of damning evidence against him. The appellant committed a very serious crime. But as Nugent JA stated in **S v Vilakazi**⁷ that:

"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. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again".

In my view, this may also include the fact that an accused had spent a period of detention before sentence, depending on the peculiar facts.

[20] The sentencing court did not in my view; impose a sentence which is disproportionate to the offender, the crime and society. The sentence of life imprisonment is justified by the peculiar facts of this case. Accordingly, there is therefore no reason to interfere with the sentence imposed by the court below.

⁷Vilakazi above note 5 para 58.

[21] In the result, therefore, I make the following order:

1. The appellant's appeal against conviction and sentence is dismissed.



TP MUDAU

JUDGE OF THE HIGH COURT

I agree



D FISHER

JUDGE OF THE HIGH COURT

Date of Hearing: 30 January 2017

Judgment Delivered: 30 January 2017

APPEARANCES

For the Appellant:

Adv. M Koos-Monyakane

Instructed By:

Johannesburg Justice Centre

For the Respondent:

Adv. M.L Gcaba

Instructed By:

**Office of the Director of Public Prosecutions
Johannesburg**