REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A23/2020

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

In the matter between:

AYANDA VALELA Appellant

and

THE STATE Respondent

CORAM: MABESELE J AND DLAMINI AJ

J U D G M E N T

MABESELE, J:

[1] The appellant was convicted in the Protea Regional Court on a charge of kidnapping and two counts of rape; each read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997. He was sentenced as follows:

Count 1 – 5 years imprisonment;
Count 2 – life imprisonment;
Count 3 _ life imprisonment.

He was deemed unfit to possess a licenced firearm. He now appeals against both convictions and sentences.

[2] The central issue in this appeal is whether the state proved its case beyond reasonable doubt that the complainant did not give consent to sexual intercourse with the appellant. The complainant was a single witness. Section 208 of the Criminal Procedure Act, 51 of 1977 allows for conviction of the accused on the evidence of a single witness provided the evidence is clear and satisfactory in all material respects.

[3] It is common cause that the complainant and appellant knew each other. The complainant had an affair with M and appellant was aware of the affair. The appellant was arrested inside the shack of the complainant after he was pointed out to the police by the complainant who had gone to the police station to lay a charge of rape against the appellant. It is further common cause that the complainant and appellant had sexual intercourse. The version of the complainant is that sexual intercourse took place during the night in her shack, without her consent. In the contrary, the appellant testified

that sexual intercourse did take place with the consent of the complainant earlier that day inside the shack of the complainant and that on the night of the same day they both shared bed but no sexual intercourse took place as alleged by the complainant. What was also in dispute was the version of the appellant that he had a secret affair with the complainant.

[4] Complainant was 45 years old at the time of the incident. Her version is that on 26th July 2014 she and her boyfriend M went for shopping to buy grocery in preparation for her birthday the next day. After they had purchased whatever items were needed they went back to her home in Lolli, Extension1. It was around 14:00. Since there was a football game on that day M left her to join his friends who watched the match on TV. As she went through the items that they had purchased with M she realised that she still needed more items. She decided to go to a local spaza shop to buy them.

[5] While she was at the shop she met her neighbour called P who asked her for a favour to go with her home to charge her cell phone because she did not have electricity at her place. The appellant who was around the vicinity also asked the complainant for the same favour. He wanted to bring his new shaving machine that he had just bought on promotion and needed to test if it was working. The complainant agreed. The appellant then followed the complainant to her home. After they had entered the house the complainant pointed the electric plug where the appellant could test his machine. She did not pay attention to him as she focused on her own things.

[6] At some point the appellant received a call. After the phone call he informed the complainant that those were his friends and he needed to leave. After the appellant had left, the complainant decided to go to P's place not far from her house. She spent quite some time at P's place. When she went back home she became worried that it was dark in the street. She looked around and saw Ayanda who stays the third house from hers. She approached Ayanda and asked if he could walk her home. Ayanda agreed. While they were walking in the street almost near the complainant's house they suddenly saw a person who he identified as the appellant emerge from the rocks near the gate of her house. The appellant approached them with a shining object in his hand. Having found themselves in that situation they ran to different directions. She ran into her yard up to the door of her room. As she took out the keys to open the door she felt someone touching her from the back on the left shoulder. That person commanded her to quickly open the door of her room. After she had opened the door the man entered the house with her. She begged that man who turned out to be the appellant not to hurt her and told him to take anything he wanted. She told him that she was sick. The appellant in turn told complainant not to waste time and started undressing her of a pair of jeans whilst having a knife in his right hand. After he undressed her he pushed her onto the bed, got on top of her, and started having sexual intercourse with her. She explained the rape incident as follows:

'I was experiencing a short breathe at that stage.

And the only thing that I could do was to clear my head so that I could get some air…….After I felt that I was wet, he slept on top of me again. And obviously that was a penis that I felt because it was getting erect as he was lying on top of me again. He then got off and faced up. I wanted to lift my head up and I became dizzy. I felt like vomiting'

[7] When she was asked whether the appellant withdrew his penis from her vagina after he had intercourse with her for the first five minutes she responded that the appellant did not withdraw his penis. She was unable to estimate the time the appellant took on top of her because she felt dizzy and wanted to vomit at that stage. Thereafter the appellant got off and lay on the bed. She too got off the bed and crawled towards a bucket which was placed near the door. When she reached the door she grabbed a towel nearby, opened the door and sneaked out. She ran to her boyfriend's place. Upon arrival she reported to him that she was raped by someone she knew but did not know the name. It was around 23:00. The boyfriend suggested that they should go to the police station. She had wrapped herself with the towel on the bottom part, on their way to the police station. On arrival she made a report to the police. After she had made a statement the police drove with her and her boyfriend to her shack. Upon arrival they found the door open and there was darkness inside the shack. As a result, the police used torches and found the appellant on the bed. He had covered himself with a duvet. When the appellant saw the police he threatened to stab them with the knife but he was apprehended. From home the complainant was taken to

the hospital. The medical report confirmed that the complainant was sexually penetrated. The complainant denied that she ever had a secret relationship with the appellant.

[8] Mr M S confirmed that the complainant came to him late at night and reported that she was raped. She said the complainant had covered herself with a towel. After the report was made to him he suggested to the complainant that they should go to the police station. He testified that he was present at the complainant's shack when the police arrested the appellant.

[9] Mr Ayanda Mazulu new the complainant by the name of N. He testified that on the day of the incident he was at the tavern in the evening when the complainant and appellant came in. There were a lot of people drinking. When it became late they were all requested to leave the tavern. As he walked through the gate he saw the complainant and appellant walk in different directions. He parted ways with them at the gate and went home.

Mr Mazulu testified that he was subsequently approached by the complainant who told him that she opened the case of rape against the appellant and she needed his support. He said that the complainant asked him to inform the police that he was accompanying her home when they were suddenly confronted by the appellant with a knife. With regard to the statement he made to the police, he confirmed the correctness of the contents of the statement that indeed he was in the company of the complainant when the appellant confronted them with a knife and grabbed the complainant. He

tried to intervene without success and ran home. After he was questioned by the prosecutor and defence counsel regarding the material discrepancies between his evidence-in-chief and the statement he made to the police the *court a quo* declared him a hostile witness and admitted his statement in terms of section 3(1)(c) of Act 45 of 1988, on application by the prosecutor.

[10] The police confirmed the version of the complainant insofar as it relates to the arrest of the appellant at her shack and particularly that the appellant threatened them with a knife when they arrest him. However, the police officer Masupha testified that the complainant was wearing a jean at the police station as opposed to the version of the complainant and M that the complainant had covered the lower part of her body with a towel. On this issue the *court a quo* correctly found that the police officer was mistaken if regard is had to the evidence of the complainant, M and the medical doctor that the complainant could not have worn jeans.

[11] The appellant knew the complainant and her boyfriend M. He said that before the 26th July 2014 had been involved in a secret relationship with the complainant for six months. His version is that on the 26th July 2014 he met the complainant around 11:00 in the street. She was on her way to a local shop. The complainant invited him over to her place of residence. Later he went to the complainant's place of residence. Upon arrival he gave the complainant money to buy beer. The complainant came back in the company of P. They sat and drank beer. After P had left them in the dining room they

proceeded to the bedroom where they had sexual intercourse. It was 13:00 then. After sex they watched a football match. After the match was played he left the house. However, they both agreed to meet at the tavern owned by P. At the stipulated time they met at the tavern and consumed more alcohol. They left the tavern at 20:00 and went to the complainant's place of residence. On arrival they went to bed. They did not have sex because they had taken alcohol and were drunk.

[12] He could not remember whether he had taken off his clothes when he went to bed or was still wearing his jacket. He said while he was asleep he was surprised to see torches lit on his face. The incident frightened him to an extent that he took out his knife from his jacket. After he had realized that the police were in the house he did not do anything to them. He was then arrested.

[13] The law is clear that where sexual intercourse is common cause what is required is a credible evidence which renders that state's version more likely that sexual intercourse took place without complainant's consent, and the appellant's version less likely that it did not (S v Gentle 2005(1) SACR 420(SCA) at 431. There is no obligation on the state to close every avenue of escape open to the accused. It is sufficient for the state to produce evidence by means of which it demonstrates such a high degree of probability that the accused committed the crime with which he has been charged.

[14] The complainant had an affair with M. Her undisputed version is that on the day of the incident, before midday, she and M went for shopping to buy grocery in preparation for her birth day the next day. M had given her money to buy grocery and she was probably happy. That being the case it is highly improbable that soon after M had left her home she would invite the appellant and had sex with him. This means that the version of the appellant that he had sex with the complainant that afternoon of 26th July 2014 is manufactured. It follows that there was no secret relationship between the complainant and appellant.

[15] The undisputed version of the complainant that after the appellant got off her and lay on the bed she crawled to the door and escaped from the house clearly shows that she was being raped. The complainant would not risk her life and go to M at midnight if nothing happened to her in her house. The fact that the appellant threatened the police with a knife when they wanted to arrest him strengthens the version of the complainant that the appellant threatened her with a knife and demanded to have sex with her, without her consent, thus demonstrate that the appellant is a violent person. With regard to Mazulu the magistrate correctly labeled him a liar whose objective was to protect the appellant. For these reasons the appellant was correctly convicted for rape.

[16] The evidence that led to the conviction of the appellant on a count of kidnapping requires scrutiny. Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement and\or, if

such person is under the age of 18 years, the custodians of their control over the child (Snyman 6th edition. P.471). The indictment in respect of count 1 reads:

> *'In that upon or about the 26th day of July 2014 and at or near Soweto-Lawley in the Regional Division of Gauteng the accused did unlawfully and intentionally deprive A R of her freedom of movement by grabbing her and or by forcing her to accompany him to the shack and or room'*

[17] Contrary to this charge the evidence of the complainant is that she had already reached home from the shop and was unlocking the door when the appellant suddenly grabbed her and they both entered the house. From her evidence it cannot be said that she was deprived of her movement. Therefore, a conviction on count1 cannot stand.

[18] It is trite law that the imposition of sentence is at the discretion of the trial court. The court of appeal may only interfere if the sentence has not been judicially and properly exercised.

[19] Since counts 2 and 3 fall within the ambit of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 and invite a sentence of life imprisonment, substantial and compelling circumstances must exist to justify lessor sentence. The Act does not say which circumstances are substantial and compelling. Although it is trite that substantial and compelling factors

include traditional factors ordinarily taken into account when considering an appropriate sentence, the minimum sentence may not be departed from for flimsy reasons.

[20] The appellant is single. He has four children with different women. The children are residing with their respective mothers. The appellant was 47 years old when he was convicted and sentenced. He is a first offender. At the time of his arrest he was employed and earning an amount of R900-00 per week. These factors, taken cumulatively, do not justify a departure from the prescribed minimum sentence. The appellant was raped in a brutal manner. This does not suggest that some rape are not brutal. Rape is brutal no matter how it is committed. The notion that some rape are not worse than others is regrettable. Rape destroys pride and self-worth of a woman as it is evident in the evidence of the complainant. Since she was raped the complainant now consider herself useless and is shy to be in the company of people. These are aggravating factors which the *court a quo* correctly took into account.

[21] It is clear from the evidence of the complainant that she was raped once and not twice, as charged. The complainant testified that at no stage the appellant withdrew his penis from her vagina until the appellant got off her. Therefore counts 2 and 3 must be taken together for purpose of sentence. Therefore both convictions and sentences on these counts cannot be tempered with.

[22] For these reasons the following order is made:

1. The appeal is upheld, partially.

1.1 The appeal against conviction and sentence in respect of count 1 succeeds. The conviction and sentence on this count is set aside.

1.2 The appeal against convictions on count 2 and 3 (taken together) and against sentence of life imprisonment is dismissed. The convictions and sentence are confirmed.

1.3 The order of the *court a quo* declaring the appellant unfit to possess a firearm is confirmed.

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M. M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

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DLAMINI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing	:	3 June 2020
Date of judgment	:	3 June 2020
For the appellant	:	Adv. Mosoaneng
Instructed by	:	Legal Aids S.A
For the respondent	:	Adv. Thwala
Instructed by	:	DPP