REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A492/2013

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

04/06/20 ..... Twala .....

Date **ML TWALA**

In the matter between:

MANQELE; VELIA **FIRST APPELLANT**

SIBIYA; RICHARD **SECOND APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 4th of June 2020.

TWALA J

[1] This is an appeal against both the conviction and sentence premised under the provisions of s309 (1) (a) of the Criminal Procedure Act, 51 of 1977 (CPA) as amended which confers an automatic right to appeal to the High Court to a person who has been convicted and sentenced to life imprisonment by a Regional Court under s51 of the Criminal Law Amendment Act, 105 of 1997 (CLAA).

[2] There are two central issues for determination in this appeal. The first is whether the first appellant had sexual intercourse with the complainant with her consent. The second, is whether the second appellant did in fact have sexual intercourse with the complainant on the day in question without her consent.

[3] The appellants were charged as accused one and accused three and were convicted by the Magistrate Court sitting in Johannesburg on various counts ranging from assault with intent to do grievous bodily harm, kidnapping, robbery and rape of the complainant. The first appellant was convicted on all the counts and sentenced to life imprisonment on the count of rape with the sentences on the other counts ordered to run concurrently with the sentence

of life imprisonment. The second appellant was convicted on kidnapping and rape of the complainant and sentenced to life imprisonment for rape with the sentence on kidnapping ordered to run concurrently with the sentence of life imprisonment.

[4] It is noteworthy at this stage to mention that the first appellant pleaded not guilty to the charges and tendered admissions that he had consensual sexual intercourse with the complainant. The second appellant did not tender any plea explanation but denied having raped the complainant. Further, I propose to deal with the charge and conviction of rape and the rest will follow from that point.

[5] It is apparent from the record that on the 4th of March 2007 at about 00:00 the complainant left the Broadway Pub in Bez Valley where she was drinking with her friends. On her way home she was accosted by the first appellant and his male companion. The first appellant hit her with an open hand, strangled her and demanded that she give him her cell phone and money. The first appellant's male companion started to search her trousers and found her house keys. She was then dragged by the first appellant and taken to her house where the first appellant ordered its male companion to take her Sansui DVD, CDs, speakers, handbag, cell phone, money, the bankcards and CD player.

[6] The first appellant then dragged her to a room in the basement of another house where she found the second appellant with the person who was charged as accused number two. The male companion of the first appellant then placed the items they took from her house at the door of the basement room and left. The first appellant through her on the floor and took off her trousers and underwear. She started screaming as he ordered her to open her legs wide. He then strangled her and threatened to kill her if she continued to scream. He

then forcefully inserted his penis without a condom in her vagina, raped her until he ejaculated. Then it was the turn of the person who stood trial as accused number two, who also inserted his penis without a condom into her vagina, raping her until he ejaculated. Once the second person was finished, the second appellant said he was going to use a condom and proceeded to insert his penis in her vagina until he ejaculated. Thereafter, she was ordered to lay on the bed with all three men who had just raped her still half naked without her trousers and underwear.

[7] The first appellant then left the room with the bag that had the items taken from her house only leaving the handbag of the complainant behind. On his return, the first appellant ordered her to bend down and inserted his penis into her vagina from behind and kept on threating to kill her as she kept on crying and screaming. The man who stood trial as accused number two and the second appellant then left the room leaving the first appellant with the complainant. The first appellant fell asleep on the bed – thus the complainant got an opportunity to escape and went straight to report the incident at the police station. The police accompanied her to this basement room where they found the first appellant and arrested him. She only knew the first appellant by sight as she has seen him passing in front of her house and it was the first time she saw the second appellant. She testified further that there was sufficient light at the basement – hence she was able to clearly see and identify the person who stood trial as accused number two and the second appellant.

[8] Dr Lembethe (Lembethe) who examined the complainant on the day testified that the complainants' clothes were dirty and soiled. She had injuries on her neck and she appeared to be worried and tired. The complainant had multiple laceration on 5 and 7 0'clock which is the bottom of her vagina and from this examination he came to the conclusion that there was evidence of forceful

vaginal penetration which is inconsistent with consensual sexual intercourse. The neck injuries were consistent with strangulation. The complainant informed him that she was raped by three men and one of them used a condom. He collected semen from the volt of the vagina and sent it for forensic testing.

[9] Constable Ramatsobane Felistas Mapeka (Mapeka) testified that the complainant made a report to her, at about 13H00 on the 4th of March 2007, about having been raped by three men that day. She then requested assistance from her colleagues and went to the basement room where the alleged rape took place. On their arrival at this basement room they found two men and she arrested the first appellant as he responded to his name as given by the complainant. The complainant did not express herself properly – she seemed to have been strangled as her voice was hoarse and her words could not come out clearly and properly.

[10] Inspector Gladys Papo (Papo) testified that on the 11th of March 2007 at about 18h00 she was at the holding cells at the police station when she was called by the person who stood trial as accused number two in this case. He informed her that he had seen his friend, the second appellant, who was his accomplice passing by whilst he is in custody. He said his friend is Selamusa Sibiya. She called Selamusa who respondent and accused number two identified him as the person he was with at the time of the incident. The second appellant denied knowing accused number two, however she arrested him.

[11] In summary the version of the first appellant was that he has a love relationship with the complainant who on the day in question was upset since she found her boyfriend, who is also the father of her child, with whom she

is living with another woman. The complainant requested to spend the night with him and since he could not take the complainant to his place, he asked accused number two to accommodate them for the night. He met the complainant on that day when he left Tony's Tavern with accused number two and was on the way to the Broadway Pub. He drank beer together with the complainant before they went to accused number two's house where they had sexual intercourse before accused number two joined them. The complainant requested him and accused number two to escort her to her house to fetch her child and that the first appellant and accused number two must beat up her boyfriend if he is in the house. However, since they were young and drunk at the time, and they knew that the complainant's boyfriend was heavily built, they summoned the help of the second appellant.

[12] On approaching the residence of the complainant, she ordered them to wait outside since her boyfriend was not in the house as his vehicle was not in the garage. She went into the house and came back with a bag full of her belongings but not with the child. They went back to the house of accused number two where they gave the contents of the bag to one Bongani to go and sell, for the complainant wanted money to hire a vehicle so that she could take her belongings from her house together with her child. When Bongani did not come back, the complainant became angry. He was surprised to see the complainant coming to the room with the police and he was arrested. When he asked the complainant when he raped her, she responded by saying that it would have been better if it was him and not his friends.

[13] The second appellant's version is that he was called by accused number two to accompany them to Bez Valley since it is known to be dangerous at night especially when the first appellant was in the company of a woman. He accompanied them and when they came back to accused number two's house,

he left them. He did not rape the complainant and he was seeing her for the first time that day.

[14] It is trite law that the burden is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused.

[15] In *S v Jackson 1998 (1) SACR 470 (SCA) at 476* the court stated as follows:

"Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

[16] In *Shackell v S 2001 (4) ALL SA 279 (SCA)* Brand AJA (as he then was) stated the following:

"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[17] It is trite that a Court may convict an accused person of any offence on the single evidence of any competent witness. However, the Court need to treat that evidence with caution. The evidence must be credible and reliable and be

supported by other evidence or facts. In considering the evidence, the Court must not take a compartmentalise approach but to consider the evidence in its totality.

[18] Section 208 of the Criminal Procedure Act 51 of 1977 provides as follows:

"Conviction may follow on the evidence of single witness:
An accused may be convicted of any offence on the single evidence of any competent witness".

[19] In the case of *S v Van der Mayden 1999 (1) SACR 450 (WLD)* this Court (as it was then) stated the following:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[20] I do not agree with the contentions of counsel for the appellants that the Court a quo was wrong in its findings that the evidence of the complainant was credible and reliable. The complainant testified that she made a statement to the police almost immediately after the incident and she was hurting, distressed and confused at the time. In my view, nothing turns on whether she said two or three people accosted her at the corner of the street that night. My understanding of the testimony of the appellants is that they, together with the person who stood trial with them as accused number two, spent some time that evening with the complainant. It is my respectful view therefore that the identity of the appellants does not arise in this case for they both place themselves at the scene of the crime. Moreover, the second appellant was

pointed out to the police by accused number two when he walked pass the police station and the evidence of Papo in this regard stands uncontroverted.

[21] I am unable to disagree with counsel for the respondent that the complainant in this case cannot be regarded as single witness because her evidence is supported by the facts and other witnesses. The evidence of Dr Lembethe remained unchallenged that the complainant had injuries on her neck which were consistent with strangulation and that her clothes were dirty. Nor was the whole medical report by Dr Lembethe challenged as it stated that the complainant sustained multiple perennial and fossa lacerations at the bottom part of her vagina. He concluded that this was consisted with forced penetration of the complainant. The issue of strangulation was also corroborated by the evidence of Mapeka who testified that the complainant spoke with a hoarse and unclear voice when she made the report to her. She also testified that her clothes were dirty.

[22] It is my respectful view that the Court a quo cannot be faulted in not accepting the evidence of the appellants or in finding that it was probably false and was unreliable. It is incomprehensible that the second appellant would be woken up by accused number two at 4H00 in the morning and join the rest of the people in accused number two's house without even asking what the problem was. When confronted on this aspect, he adjusted his version to say he was told to accompany them because it was dangerous to walk to Bez Valley at night especially in the company of a woman. However, he did not know this woman and he could not justify why it was urgent at the time instead of waiting until morning or day break. Further, the uncontroverted evidence of Papo is that the second appellant denied that he knows accused number two when he pointed him out to her as a person he was with on the day of the commission of the crime.

[23] It is baffling that the first appellant would have sexual intercourse twice with the complainant on the day but never realised or observed the injuries on her neck and that her clothes were soiled and or dirty. Similarly, the second appellant, who according to his evidence joined in later, did not see or observe anything wrong with the complainant. I hold the view therefore that the appellants' version of events is contrived and convoluted to suggest that they were there to assist a hurt and distressed complainant. According to the first appellant, it is the complainant who wanted to drink so much for her troubles that she would ask strangers to buy her alcohol and or to borrow her money to buy more alcohol. This same person made a daring escape from her captivity leaving her handbag behind and dashed straight to the police station to report her ordeal. But this is the person the first appellant alleges to be having a love relationship with.

[24] Further, it is the complainant who wanted the appellants to accompany her to her house to fetch her baby, assault her boyfriend and take his car. Instead she comes out without her child but some of her house hold belongings and offers them for sale to secure money to hire a vehicle to take her child and herself to the Eastern Cape. However, none of them is bothered about that including the second appellant who came there to try and settle the dispute between the complainant and her boyfriend amicably and to beat him up if he became violent. It is on record that the complainant socialised and drank with her friends that night and she was on her way home, having left her friends at the tavern, when she was confronted by the first appellant and his cohort. The appellants concocted the reason for the complainant to lay charges against them as because a Bongani who was engaged by the first appellant to sell her belongings failed to return with the money or the items belonging to the complainant – hence she was angry and upset with that.

[25] It is my considered view therefore that the Court a quo did consider the whole conspectus of the evidence before it and correctly found that the State has proved its case against the appellants beyond reasonable doubt. The Court a quo correctly found that the first appellant assaulted the complainant, robbed her of her belongings and took her and held her against her will at the house of accused number two and raped her more than once. Further, the Court a quo correctly found that the second appellant held the complainant at the house of accused number two against her will and raped her.

[26] Further it is settled law that an appellate court should not interfere with the conclusions on primary facts of the lower court, unless satisfied that they are plainly wrong. Put differently, the Court of Appeal would only interfere, in exceptional and very limited circumstances, with the findings of facts of the lower court if it is satisfied that the decision could not be reasonably explained or justified. The irresistible conclusion is that there is nothing exceptional in this case to warrant this Court to interfere with the findings of the Court a quo.

[27] In *S v Francis 1991 (1) SACR 198 (A)* which was quoted with approval in the case of *Maphana v S (174/2017) [2018] ZASCA 8 (1 MARCH 2018)* the court stated the following:

"The court's powers to interfere on appeal with the findings of fact are limited. Accused No 5's complaint is that the trial court failed to evaluate D's evidence properly. It is not suggested that the court misdirected itself in any respect. In the absence of misdirection, the trial court's conclusion, including its acceptance of D's evidence, is presumed correct. In order to succeed on appeal, accused No 5 must therefore convince us on adequate grounds that the trial court was wrong in accepting D's evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the

advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony."

[28] It is trite that sentencing is pre-eminently the domain of the trial Court. The Court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial Court did not exercise its discretion judiciously and correctly. Put differently, if the Appeal Court is of the view that the sentence imposed is disturbingly inappropriate.

[29] In the case of *S v MALGAS 2001 (1) SACR 496 (SCA)* the Supreme Court of Appeal stated the following:

"A Court exercising appellate jurisdiction cannot, in the absence *of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial Court."*

[30] It is on record that the appellants were charged of the crime of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 which the Legislature promulgated to provide for minimum sentences for certain crimes, unless it is demonstrated that substantial and compelling circumstances exist which obliges the Court to deviate therefrom. Such substantial and compelling circumstances should be considered including the usual triad being considered in the imposition of sentence.

[31] The first appellant was 26 years old and had attended school up to grade 11. He was employed by Gearhouse and had a 3 year old son who was living with its mother. The second appellant was 36 years old and had attended school up

to grade 5. He was unemployed with 2 children aged 9 and 14 years old. It is clear from the probation officer's report that both appellants showed no remorse for what they have done and that a custodial sentence is the only reasonable sentence in this case.

[32] It is on record that the complainant, the victim, had a two year old child at the time of the incident. She was living with the father of her child. It appears from the probation officer's report that she feels her self-worth has been taken away from her. She is scared of walking alone on the streets or to be at home alone. This incident has caused serious problems in her relationship with her boyfriend. Every time they are to have sexual intercourse with her boyfriend it reminds her of this ordeal.

[33] Rape is by its nature intrusive and humiliating to the victim. It cannot be categorised into certain degrees, it is just a despicable and barbaric act perpetrated by cowards on the most vulnerable of mankind, the defenceless women. The complainant was kept against her will, half naked without her pants and underwear in the presence of three men. This is humiliation to a woman of unimaginable proportion.

[34] In *Tshabalala and Another v S ZACC 48 2020 (3) BCLR 307 (CC) (11 DECEMBER 2019)* the court stated the following:

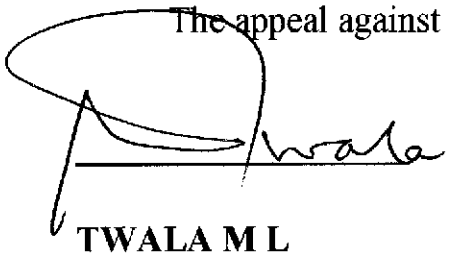
"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. 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".

[35] The Courts have been enjoined in a number of decisions not to shy away from imposing appropriate and harsh sentences where justice so demands. It is my considered view therefore that the aggravating circumstances far outweigh the personal circumstances of the appellant in this case. Therefore, I conclude that the Court a quo was correct in its finding that there are no substantial and compelling circumstances to justify it deviating from imposing the sentence as prescribed by the CLAA. Therefore, I hold the view that the appeal against both conviction and sentence falls to be dismissed.

[36] In the circumstances, I make the following order:

The appeal against both the conviction and sentence is dismissed.

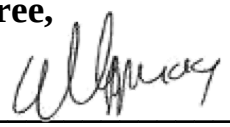


TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree,



DIPPENENAAR F

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **28th May 2020**

Date of Judgment: **4th June 2020**

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