REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NR: A 124/2012
DDP REF NR: JAP 2012/0139
DATES OF APPEAL: 29 OCTOBER 2019
and 21 FEBRUARY 2020

In the matter between:

GEORGE MOLEFE APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

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[1] On 21 February 2008 the appellant was found guilty in the Regional Court, Soweto on three counts of rape in terms of section 3 of Act 32 of 2007 (read with the provisions of section 51(1) of Act 105 of 1997) and on two counts of kidnapping.

[2] Appellant was sentenced on the same day. Three counts of rape were taken as one for purposes of sentence and he was sentenced to imprisonment for life. He was sentenced to 3 years imprisonment on each of the kidnapping convictions. The learned magistrate ordered that the sentences imposed i.r.o. the kidnapping charges would run concurrently with the life sentence.

[3] Appellant had an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977. He filed a notice of appeal against his convictions and sentences on 27 February 2008. Regrettably, a portion of the transcribed record of the proceedings went missing and consequently had to be reconstructed. All the parties involved signed off on the reconstructed record at the end of 2014. The reconstructed record was only received by the office of the Director of Public Prosecutions ("DPP") by 25 September 2018.

[4] No explanation has been proffered for these inordinately long delays. All in all it has taken more than 12 years for appellant's appeal to be heard. It is unacceptable that a criminal appeal record should take this long to be reconstructed and sent to the office of the DPP. Particularly disturbing is the fact that all parties signed off on the reconstructed record at the end of 2014, but the reconstructed record was only received by the office of the DPP on or about 25 September 2018, some 4 years later. It is not the kind of efficiency, diligence and commitment contemplated in our constitutional democracy. Access to courts is a right enshrined in section 34 of our Bill of Rights. This right should be given due regard and respect. So as to prevent a recurrence of such unacceptably long delays, this judgment will be sent to the DPP for his consideration and preventative action.

[5] This appeal was first heard by my learned brother Judge Van der Linde and me. Counsel were asked to prepare and present further argument on certain issues. Before the further hearing could take place, Judge Van der Linde, sadly, died. The matter was re-allocated to be heard before my learned sister Judge Opperman and myself. Argument was presented afresh in this re-hearing. The same counsel appeared as before and adv. N.J. Horn was

asked to present argument on certain issues, *amicus curiae*. We thank counsel for their valuable assistance.

The Facts

[6] The events giving rise to this criminal appeal took place during the evening of 1 March 2007. That evening the complainant Ms L N was walking in the Protea Glen area of Soweto. On her way back home she came across three men. This happened shortly after 8 o'clock in the evening. Appellant was one of them. They blocked her way. Her testimony paints a picture of appellant's brutality. Appellant grabbed complainant's hand and then assaulted her by twice slapping her on the cheek with an open hand and kicking her, randomly. He pulled her to a house and once there, dragged the complainant into a toilet cubicle, lifted her skirt, removed her panties and inserted his penis into her vagina. He was not wearing a condom. Sexual intercourse ended when the appellant ejaculated. All of this occurred without the complainant's consent and despite her pleas and protestations. This accounted for the first charge of rape. Thereafter the appellant pulled the complainant to the yard where he was residing, took complainant to an area behind the rooms at the yard, made her lie on the ground and again had sexual intercourse with her, without her consent and without the use of a condom. This too ended with the appellant ejaculating. It took approximately 4 minutes to move from the area where the first rape occurred to reach the area where the second non-consensual sexual act occurred. This gave rise to the second charge of rape. The appellant then took the complainant into his shack. There, on a bed inside the shack, he undressed the complainant and the appellant again had sexual intercourse with her, without a condom or her consent. Intercourse ended his ejaculation. This constituted the third charge of rape. Complainant testified that she sought help from an unknown young man, but he did nothing due to his fear of appellant. The young man later informed the appellant that his girlfriend was there, whereupon appellant ordered the complainant to dress fast and leave. She was kept in the shack for approximately 20 minutes.

[7] There is considerable corroboration of complainant's evidence that she was raped, rather than having had consensual intercourse, as the appellant contends for. The complainant's mother I N testified that while she was selling goods in the street, she saw the complainant running towards her. The complainant told her that she was raped and gave some detail of where and how it happened. She said she was running away from the boy who raped her. The complainant was weak and leaned on her. She was crying. The mother also testified that complainant's T-shirt was torn at the back.

[8] That same night, shortly before 11pm, complainant went to the police station. The police took her to Baragwanath hospital where she underwent a gynaecological examination. The medico-legal report of Dr Likibi was received in evidence by consent. He described complainant's clothing as dirty and torn and noted that her body was painful. The doctor further described in the medical report that the complainant had suffered injuries to her vagina. She had increased friability, the posterior fourchette had scarring and there was swelling and bruising at 5 and 7 o'clock.

[9] Further corroboration is to be found in the circumstances of appellant's arrest. Complainant took inspector David Munyai of the South African Police Force to appellant's house, but appellant was not there. About a week later complainant took inspector Munyai there, again. On arrival the inspector knocked on the door of the house for a long time, stating that it was the police. There was no response. The police kicked the door down, entered the house and came across a young lady. Inspector Munyai asked her about the whereabouts of "George" (the appellant). She told Munyai that George did not come back. Manyai asked her where does he sleep when he is around. She pointed to the bedroom. Munyai entered the bedroom. He testified that it was evident that someone had been sleeping in the bed. He looked underneath the bed, but there was no-one there. Inspector Munyai then opened the wardrobe and found the appellant in the wardrobe, slightly crouched, and frightened.

[10] The appellant testified that the complainant used to be his girlfriend. He denies having raped the complainant. He testified that he did not have sex with her in the toilet, nor at the back of the rooms where he stays. He admitted that he had sex with the complainant in the shack. Appellant testified that she was wet and ready for intercourse and that penetration was easy.

[11] When responding to questions regarding the evidence of investigating officer David Manyai, appellant denied that he was hiding away in the wardrobe of his bedroom when the police arrived. Appellant admitted, however, that he was in the house at the time.

Onus of Proof and Proper Approach to the Facts

[12] The onus rests on the state to prove beyond a reasonable doubt that the accused committed the crime accused of. Equally trite is the principle that an accused should be acquitted if his or her exculpatory testimony can be reasonably possibly true.

[13] Is has long been our law that the trier of fact should not consider the evidence implicating the accused and evidence exculpating the accused in a compartmentalised manner. The court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence; see ***R v Difford 1937 AD 373***, ***S v Van der Meyden 1999(1) SACR 447 (W)*** and ***S v Toubie 2004(1) SACR 530 (W).***

[14] The proper approach to evidence and the assessment of probabilities was described in ***R v Mlambo 1957(4) SA 727(A)*** at 738 A to C:

> *"'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*

> *An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."*

[15] The passage was quoted with approval by Olivier JA in ***S v Phallo and Others 1999(2) SACR 558 (SCA)*** at 562g to 563e.

[16] In my opinion, especially having regard to the wide range of witnesses that corroborated the complainant in several aspects of her evidence, the state has proved beyond reasonable doubt that the crimes of rape and kidnapping were committed by the appellant. The exculpatory evidence of the appellant, also, cannot reasonably possibly be true.

Case Law on Multiple Sexual Acts

[17] The appellant was found guilty on three counts of rape.

[18] The facts that arise in this matter are not uncommon in rape cases. Several sexual acts, committed without consent, being perpetrated by the same accused with the same complainant, within short intervals and often at the same place. The question often posed is whether the several acts should account for one or more convictions of rape.

[19] Each case must, of course, be evaluated and judged on its own facts. Nonetheless, examples in case law are of assistance to establish the jurisprudential flow of thought and to divine principles therefrom, to the extent applicable.

[20] Mere and repeated acts of penetration cannot without more be equated with repeated and separate acts of rape. As a general rule, the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will find that a series

of separate rapes has occurred. Where an accused has ejaculated and withdrawn his penis from the victim, but he again penetrates her thereafter, it was inferred that the accused has formed the intent to rape the complainant again, even if the second rape took place soon after the first and at the same place. (See **S v Blaauw 1999 (2) SACR 295 (W)** at 299 c-d and 300 c-d.)

[21] In **S v Mavundla 2012 (1) SACR 548 (GNP),** after the appellant had locked the door to his house, he told the complainant to take off all her clothes, which she did, because of the knife the appellant was holding. The appellant then ordered the complainant to get onto the bed. He inserted his penis into her vagina and had intercourse with her until he ejaculated. After that the appellant told the complainant to climb off the bed and hold onto it. He then penetrated her from behind and had intercourse with her, again, until he ejaculated. (It is not clear how long this took.) After that the appellant told the complainant to get onto the bed again where the appellant had intercourse with her once more while she was lying on her back. The appellant ejaculated for the third time. (Again it is not clear how long this took.) The appellant then fell asleep. The complainant woke him and asked for the key, which he gave her. The complainant dressed and went home.

[22] In Mavundla's case the court accepted the evidence of the complainant that there was no interruption in the intercourse, the appellant simply shifted the position of the complainant. While ejaculation could determine the end of intercourse, in this case that clearly did not happen. There was no suggestion that the intercourse had ended and that the appellant withdrew his penis twice and formed the intention to rape the complainant on two further occasions. The court found that this was one prolonged act of intercourse.

[23] In **S v Tladi 2013 (2) SACR 287 (SCA)** the appellant was charged with two counts of rape. He overpowered the complainant in his room. She fell onto a sponge. He unzipped his trousers, removed her panties and had sexual intercourse with her twice, without her consent. He was convicted on both counts and sentenced to life imprisonment. On appeal the court found that only one act of rape had been proved beyond reasonable doubt, on the reasoning at p 291 d to f:

> *"There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not suggest that there was an interruption in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. This evidence against the appellant is therefore limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analysed the state's evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt."*

[24] In **S v Maxabaniso 2015 (2) SA 553 (ECP)** the appellant took the complainant to his home. Upon their arrival he ordered two young boys who were present, to leave. When the complainant realised that he had plans with her, she escaped when she thought that it was opportune to do so. He caught her, took her back into the house, locked the door, undressed her and himself and penetrated her. At some stage he stopped, withdrew from her, informed her that he was not finished with her and left the room to go to the toilet. When he returned from the toilet, he threw the complainant onto a mattress on the floor and penetrated her again. The court found that the magistrate's finding that the appellant raped the complainant twice, was correct. The court reasoned at 555g – h:

> *"This was not one continuous course of conduct or, as in one of the rapes in S v Blaauw supra, an interruption in an act of rape to change the position of the victim. Rather, two distinct acts of penetration occurred, in different places in the room, with the first interrupted by the appellant withdrawing from the complainant and leaving the room for a period."*

[25] There are other authorities on the issue, but those largely cover the principles laid down and illustrate the courts' approaches to multiple sexual acts. The cases dealing with different kinds of penetration, such as in **S v Seedat 2015 (2) SACR 612 (GP)** and **S v Ncombo 2017 (2) SACR 683 (ECG),** are not dealt with, for they do not apply to the facts of this matter.

[26] In the present appeal, every sexual act was perpetrated quite separate in time and took place at distinctly different places. Appellant dragged the complainant from one place to another, raping her at three different places. During each sexual act, appellant ejaculated. These facts have already been described in para [6]. What is clear is that the appellant formed a new intention before each incident to have intercourse with his victim, again.

[27] On the facts proven in this case, and applying principles laid down by our courts, I am of the view that the appellant has been convicted correctly on three counts of rape. The convictions on the three charges of rape are confirmed.

The Two Counts of Kidnapping

[28] The evidence of the complainant was that the appellant deprived her of her freedom of movement by pulling her to a toilet and, thereafter, pulling her to his premises and forcing her into his home and bedroom. Appellant kept the complainant captive for a couple of hours.

[29] Snyman, Criminal Law, 6th edition, p471 defines kidnapping in the terms: "*Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement*." The evidence of the complainant has proved all elements of the crime.

[30] The appellant was convicted of two counts of kidnapping. The only question left to be answered is whether the two counts amount to a duplication of convictions.

[31] The "single intent" test is commonly used to determine whether a duplication has occurred. The test determines that where a person commits two acts, each of which could be separately labelled as criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then that

person may be convicted of only one offence because the two acts constitute one continuous criminal transaction.

[32] The single intent test is particularly applicable where the accused has carried out a number of unlawful acts. Thus, where an accused commits a whole series of acts each one of which, standing alone, could be a separate offence, but they constitute a continuous transaction which is carried out with a single intent, his conduct would constitute a single offence.

[33] The kidnapping was perpetrated in order for the appellant to have unlawful intercourse with the complainant. The two unlawful criminal acts of kidnapping constitute a continuous transaction and therefore amounts to a duplication of convictions. Adv Britz, acting for the state, conceded as much in her heads of argument. The concession was correctly and properly made.

[34] In consequence the second conviction of kidnapping and the sentence pursuant thereto, are set aside.

On Sentence

[35] The appellant has a previous conviction for rape. On 11 January 1999 he was found guilty of rape and sentenced to 10 years imprisonment. He was released in 2006, having served 7 years and 3 months in Leeukop prison.

[36] The traditional approach on when and to what extent a court of appeal can interfere on sentence imposed by the trial court was described by Malan JA in ***S v Malgas 2001(1) SACR 469 (SCA)*** **at 478d**:

> *"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 be to usurp the sentencing discretion of the trial court … However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial*

> *court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate' … In the latter situation … [i]t may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."*

[37] In **S v PB, 2013 (2) SACR 533 (SCA)** Bosielo JA formulated the approach by a court on appeal against a sentence imposed in terms of the minimum sentencing legislation at para [20]:

> *"What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."*

See also the principles applied and approaches adopted by Nugent JA in **S v Vilikazi 2009 (1) SACR 552 (SCA)** at 562G and by Lewis JA in **S v Nkomo 2007 (2) SACR 198 (SCA)** at 201e-f.

[38] The learned magistrate properly considered and weighed up the personal circumstances of the appellant, the seriousness of the crimes and the interests of society. There is in my opinion no ground for interfering with the sentence handed down on the three charges of rape which the magistrate considered one for purpose of the sentence, nor the sentence on the first count of kidnapping. The magistrate's order that the sentence will run concurrently is, in my opinion, correct. So, too, his decision and order that the accused is unfit to possess a firearm.

The Order

[39] I propose that the following order be made:

[i] The appeal against the convictions and sentences on the three charges of rape is dismissed. The convictions and sentences are confirmed.

[ii] The appeal against the conviction and sentence on the first count of kidnapping is dismissed. The conviction and sentence are confirmed.

[iii] The appeal against the conviction on the second count of kidnapping is upheld. The conviction and sentence are accordingly set aside.

[iv] The order that all the sentences will run concurrently, is confirmed.

[v] The order that the accused is unfit to possess a firearm, is confirmed.

[vi] A copy of this judgment is to be made available to the DPP and his attention is to be drawn to the content of paragraphs [3] and [4] of this judgment.

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A.P. Joubert
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I agree. It is so ordered.

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Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 29 October 2019
Further Hearing: 21 February 2020
Judgment delivered:
Appearances:
For Appellant: Adv. Y. Britz
Instructed by: Legal Aid South Africa
For Respondent: Adv. C.E. Britz
Instructed by: Office of the Director of Public Prosecutions
Amicus Curiae: Adv. N.J. Horn