NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASE No. A704/2011

DATE:21/08/2012

In the appeal of

NHLANHLA MINISI — First Appellant

JACOB MNISI — Second Appellant

and

THE STATE

JUDGMENT

Van der Byl AJ:-Introduction

[1] The Appellants (to whom I will for the sake of convenience refer to as Accused No. 1 or Accused No. 2 or, as the circumstances may require, collectively as "the Accused"), having been convicted in the regional court sitting at Benoni on a charge of Rape on 24 February

2006, were, in terms of section 52(1)(b) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997) (as it provided at the time), referred to the High Court for sentence.

[2] On 26 February 2009 Mavundla J confirmed the conviction, and sentenced each Accused to 15 years imprisonment, and ordered the prison authorities to consider, when considering their release on parole, the period of four years that the Accused have been detained awaiting trial.

[3] The two Accused, with leave of the learned Judge, now appeal against both their conviction and sentence.

[4] The appeal calls for a consideration of all the evidence adduced in this matter. The charge and evidence adduced

[5] The charge against the Accused was that upon or about the 14th of March 2005 and at or near Putfontein the Accused did unlawfully and intentionally have sexual intercourse with T M, at the time a 17 year old female person, without her consent.

[6] Both Accused, each having been represented by his own legal representative, pleaded not guilty. Accused No. 2 admitted having had sexual intercourse with the complainant, but indicated that it occurred with her consent. Accused No. 1 elected to exercise his right to remain silent.

[7] At the commencement of the trial a medical report (J88) on the medical examination conducted on the complainant at Thembisa Hospital on 14 March 2005 at 20h45 was handed

in by agreement between the parties from which it appears that genital samples were taken from her vulva and vaginal vault.

[8] The State adduced the evidence of four witnesses.

[9] Firstly, there is the evidence of the complainant, Ms. T M, herself.

[10] She testified that on Sunday, 13 March 2005 at about 19h00 on her way home after having visited a friend, Thembi Mthembu, she was, shortly after her friend who accompanied her to a point close to her home, left her, accosted by the two Accused. They were not known to her. She was told that her dad was at his friend's house and was calling her. Not believing them she asked them how her dad looks like. Although they described him accurately she, still not believing them, asked him to tell her more they knew about him. When they described the car he was driving she eventually accepted that her father called her and accompanied the two Accused to a place where her father according to them found himself. It was in a street where she knew her father's friend lived. On their way Accused No. 2 proposed to her. She declined. At a house they stopped where Accused No. 2 said he wanted to fetch a jacket as he was cold. As Accused No. 2 came out of the house Accused No. 1 grabbed her. She was kicking and screaming, but the two Accused dragged her into the house. Inside Accused No. 1 grabbed hold of her hands from behind whilst Accused No. 2 opened her legs, unzipped his trousers, pushed her panty aside and raped her. Having done that Accused No. 2 grabbed her hands from behind whilst Accused No. 1 in turn similarly raped her. It was only the next morning that she was able to push her way out of the house when the door was opened for one of their friends to enter (who was, incidentally, at the time of her testimony also at court).

[11] Having found her way out of the house she ran to the house of her friend she visited the previous day. Her friend was getting ready to go to school. She did not tell her what happened to her, because, according to her she was at that stage too embarrassed, but asked her to come with her to her house. I pause to mention that it later became apparent that she in the course of the morning while she was in possession of her friend's cell phone, left a so-called "reminded on her cell phone, set for about 1h00, to the effect that she was raped. They, however, found her home locked. She asked her friend to give her some money so that she could phone her father. She, thereupon, phoned him from a public phone booth. She was crying and asked him to come home. He, however, indicated that he could not get away and told her to go to her grandparents' house. She then went back to her friend's house where she remained the whole day. At about 16h00 when her father arrived at home she went home where she told him that she need to go to a doctor and to the police station. He asked her why. She then told him that she was raped. They then went to the Putfontein Police Station where she made a statement whereafter she was taken to Thembisa Hospital where she was medically examined.

[12] Under cross-examination on behalf of Accused No.1 the complainant was confronted with the contents of her police statement. It would appear that the statement was taken in English by an Afrikaans speaking female police official. According to the statement, as put to her, she had stated that one of the Accused raped her twice and that the other one raped her only once. According to her that is what she remembered at the time. It was put to her that nothing happened between her and Accused No. 1, that a friend of his will testify that he accompanied her to the phone booths in the early hours of the morning and that she came back and went back into the yard of Accused No. 2 without anything happening.

[13] Under cross-examination on behalf of Accused No. 2, it was put to the complainant that Accused No. 2 will testify, and will call his own witnesses to corroborate his version to the effect, that she had consensual sex with him on the morning of 14 March 2005 after having met her at Accused No. 1 's house, that she then in the company of a friend went to a telephone booth to make a phone call and then went to his house where she had consensual sex with him.

[14] She denied all these allegations as a lot of lies.

[15] As the second witness the State adduced the evidence of the complainant's father, Mr. Bafana Mashiane.

[16] In his evidence, which basically confirmed the complainant's evidence, he testified that on Sunday, 13 March 2005 at about 19h00 he arrived at home after having visited a friend in Daveyton. The complainant was not there. It has never happened before. He went to her friend's house, but she was not there. She did not come back home all night. He reported her absence the next morning to the police. He left home at 6h30 as he had a job interview at 8h00. Whilst he was waiting for his interview she phoned him at about 7h30. She was crying and asked where he was. He told her to go to her grandparents. When he returned home the afternoon he found her at home. She was crying and told him that she was raped by two men.

[17] The third State witness was the complainant's friend, Ms. Nomathembi Precious Mthembu, referred to in the evidence as Thembi.

[18] She confirmed that the complainant came to her home on Sunday, 13 March 2005 and

that she at about 19h00 accompanied her on her way home where she left her at a corner next to her house. The next morning while she was preparing herself for school the complainant again arrived at her home at about 6h00. She was crying. She asked her what had happened to her but she did not tell her. She took her cell phone whilst she dressed herself for school. The complainant then asked her to go with her to her place to see if there are people. There were no people whereafter they walked to a Cell C container public phones. She said she wanted to phone her father. She then gave the complainant the key to her home. They then parted. Later when she returned from school she saw the reminder the complainant left on her phone in which she indicated that she was raped. She returned home at 15h00. The complainant was still there. She then accompanied the complainant to her home where they found her father. They then left to go to the police station.

[19] At this stage the matter was postponed to 3 February 2006. On resumption on that date Accused No. 2's legal representative withdrew, whereupon, the legal representative who appeared on behalf of the Accused No. 1 from thereon also represented Accused No. 2 in the further proceedings.

[20] The last witness called on 3 February 2006 was a Sergeant in the SAPS and an Assistant Forensic Analyst connected to the Forensic Science Laboratory in Pretoria, Ms. Sibongile Ndaba who examined the genital samples taken from the vulva and vaginal vault of the complainant which she compared with control samples of the two Accused. She found that the DNA profile obtained from the vulva and vaginal vault is the result of the mixture of the genetic material obtained from the blood sample of Accused No. 2.

[21] At the end of the State case an application for the discharge of the two Accused was

dismissed by the magistrate.

[22] The Defence case was, thereupon, closed. It is noteworthy that the magistrate specifically asked the Accused's legal representative whether they realise that in the absence of any evidence on their part the State's case stands uncontested. Their representative confirmed that he explained everything to them and that they understand the situation.

[23] The magistrate, thereupon, in a reasoned judgment held that the State proved its case beyond all reasonable doubt and convicted the Accused on the charge of Rape as charged and referred the case to the High Court for sentence in terms of section 52 of the Criminal Law Amendment Act, 1997.

Proceedings in High Court

[24] As is apparent from the papers this matter came before Mavundla J on 26 February 2009, ie., more than three years later and more than four years after the Accuseds' arrest on 18 March 2005.

[25] I need for this reason and another reason with which I will deal in a moment to deal briefly with the developments of this matter since it was referred to the High Court by the magistrate on 3 February 2006.

[26] It appears that the matter served before Preller J on 7 December 2006. The proceedings which served before Preller J have for some inexplicable reason not been transcribed. It, however, appears from the judgment delivered by Preller J that the matter was on that day

postponed for hearing on 10 and 11 May 2007 for at least two reasons.

[27] Firstly, Preller J perceived the record of proceedings not to have been properly transcribed. Apart from a single insignificant passage where the record which was corrected by the magistrate on 31 January 2007 Preller J's concern disclosed no difficulties.

[28] Secondly, it would appear that in the proceedings before Preller J it was argued that there is a need for the reopening of the case as Accused No. 1 wishes to raise a defence of an alibi because of a patent error in the chargesheet which only then came to light.

[29] On 22 April 2008 the matter again served before the magistrate on the occasion of which an application was launched for the reopening of the case. The application was in the case of Accused No. 1 based on a contention that according to the chargesheet the incident occurred on 14 March 2005 being a date in respect of which he has an alibi. In relation to Accused No. 2 the contention was that on that day and the time of the incident he was alone at home.

[30] The magistrate, correctly in my view, dismissed the application.

[31] The application was obviously not only based on an afterthought, but also one not supported by the evidence and in any event one which could have been addressed in the course of the trial.

[32] As far as the date of the charge is concerned it is clear from the evidence of the complainant that she was accosted and raped by the two on Sunday, 13 March 2005, after 19h00 and that she was detained in Accused No. 2's house until she was able to free herself

at about 6h00 on Monday, 14 March 2005. Her evidence was never in this regard challenged. As a matter of fact Accused No. 2 in his plea explanation and according to his version as put under cross-examination to the complainant admitted having had sexual intercourse with the complainant. Accused No. 1 in turn made no effort to establish an alibi in the course of the trial. Although he exercised his right to remain silent, the situation is, as was held in Sv Boesak 2001 (1) SACR1 (CC) at 11d, para [24], that an accused's right to remain silent and, therefore, to be under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will, of course, depend on the weight of the evidence.

[33] Mavundla J duly dealt with this aspect together with the evidence dealt with and considered by the magistrate and concluded that the proceedings have taken place in accordance with justice.
[34] I have no reason to hold otherwise.

The sentences imposed
[35] This brings me to the question of sentence.

[36] We heard some argument, particularly, with a view to the decision in S v Makatu 2006 (2) SACR 582 (SCA), as to whether or not the sentence imposed is a fair one. The argument is based on the fact that the Accused were alluded to in the chargesheet that they were charged with the crime of rape "read with the provisions of section 51(2) of the Criminal

Law Amendment Act 105 of 199T in terms of which a minimum sentence of 10 years imprisonment is prescribed. This is, however, a matter to which section 51(1) of that Act applies in terms of which a minimum sentence of life imprisonment applies, being the basis on which the learned Judge a quo approached the matter. The learned Judge, however, held that there no substantial and compelling circumstances existed and imposed the lesser sentence of 15 years imprisonment.

[37] The question we were called upon is, notwithstanding the learned Judge a quo's approach, whether a sentence of 15 years imprisonment was in any event an appropriate sentence in the circumstances.

[38] In my view the sentence imposed is indeed an appropriate one.

[39] This is clearly a rape which can be termed as a gang rape which calls for a minimum sentence of life imprisonment,

[40] Mavundla J in considering sentence took into consideration evidence adduced by and on behalf of the Accused in mitigation of sentence and in effect held that there are substantial and compelling circumstances justifying the imposition of a sentence lesser that the prescribed sentence of life imprisonment.

[41] It is trite that, as has been held in, inter alia, S v Rabie 1975 (4) SA 855 (A) at 857D-F, that in every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

11 (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'".

[42] It was, furthermore, held that in determining whether a court's discretion has been judicially and properly exercised a court on appeal has to determine whether such discretion has been vitiated by irregularity or misdirection or is disturbingly inappropriate.

[43] Rape is, as held by Mavundla J, referring to the case of N v T 1994(1) SA 862 at 862G a "horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim".

[44] In S v Chapman 1997 (2) SACR 3 (SCA) the learned Judge said the following at 5d-e:

“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".

[45] The only issue of concern is the period during the Accused were detained awaiting trial. Mavundla J ordered that, as I have already indicated, ordered the prison authorities to consider, when considering their release on parole, the period of four years that the Accused have been detained awaiting trial.

[46] In S v Vilakazi 2009(1) SACR 552 (SCA) at 575b the Court, however, ordered, in similar circumstances that the period of detention be deducted from the sentence imposed when calculating the date upon which the sentence is to expire.

[47] In my opinion the order made by Mavundla J should be altered so as to make it clear that the period of detention should be deducted from the sentence imposed.

Order

[48] For these reasons the following order is made:-

1. Subject to paragraph 2 below, the appeal against conviction and sentence is dismissed.
2. The order to the effect that the prison authorities are to consider, when considering their release on parole, the period of four years that the Accused have been detained awaiting trial is set aside and replaced with the following order:

"The prison authorities are ordered to deduct a period of four years from the sentences imposed when calculating the date upon which the sentences imposed are to expire.".

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

A M L PHATUDI

JUDGE OF THE HIGH COURT

I agree

N B TUCHTEN

JUDGE OF THE HIGH COURT

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JUDGMENT DELIVERED ON: 21 August 2012