IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: A85/13

DATE: 20 FEBRUARY 2014

In the matter between:

C[…] M[…] **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

[1] The appellant appeared before the regional magistrate at Nelspruit on four charges of rape and attempted murder. He was convicted of all charges. He was sentenced to the following terms of imprisonment:

1. Rape committed on 28 April 2010, 15 years;
2. Attempted murder committed on 28 April 2010, 3 years;
3. Rape committed on 29 April 2010, 15 years;
4. Rape committed on 30 April 2010, life imprisonment;
5. Rape committed on 30 April 2010, life imprisonment;

Leave to appeal his conviction and sentence was granted by the court *a quo*.

[2] The appellant and complainant lived together as husband and wife and a child was

born from this relationship. The complainant terminated the relationship and went to live at Nkombula. The appellant resided at Ngodini Mielieland. On 28 April 2010 after work, she encountered the appellant at the bus terminal and he got onto the same bus she took to travel to her home. The appellant sat next to her and informed her that he wished to resume their relationship and threatened to kill her if she refused. He accompanied her to her house. She refused to open the door and an argument ensued,. She called her brother K[…] Z[…] ("K[…]") to report the incident. On his arrival he found them still arguing. The appellant later convinced her brother that he would apologize to her and that he would not harm her. After her brother left the appellant pulled her by her hair into the bushes, twisted her arm, throttled her until she had difficulty breathing. He undressed her and raped her. He continued to throttle her during the rape and also when he had finished and threatened to kill her and also kill himself. Out of fear she apologized to him and agreed to resume their relationship.

[3] The appellant persuaded her not to use the same road they had used to the bushes because her brother might see them. They walked in the bush area from about 20h00 till 24h00. There was a stage where she could no longer walk and he had to carry her on his back till they reached a tarred road, they walked to a place called Bhuka where they got a lift to Ngodini and from there they walked to his residence at Mielieland. They arrived there between 1 h00 and 2h00 and it was the next day on the 29th. At his residence he again had sexual intercourse with her without her permission. The appellant took out a bottle of Bon Aqua and told her it contained poison which he wanted her to drink first to see if it would kill her and then he would also drink it. Again she apologized to him and promised to fetch their baby so that they would get back together. At about 5h00 her mother called on her phone and the appellant allowed her to speak to her. The complainant informed her mother that she was with the appellant and that he had a bottled full of poison and wanted to kill her. She persuaded her mother not to go to the police.

[4] The appellant accompanied her to her residence in the morning because she had to change clothes and go to work. She reported the incident to the police at Nelspruit and she was informed to open a case at Kaboweni. After work she went to her mother's residence and reported the incident and her mother informed her that her brother had already given her a

report. The next morning that is on the 30th the appellant called her and sent an sms at about 6h30 and she did not respond. At 16h00 the appellant came to her work place because he wanted to talk to her. She informed him that her regional manager was present and that she was going to knock off at 18h00. She then called her sister N[…] to wait for her at the station and that if she did not arrive they should go to the police. When she knocked off the appellant was waiting for her, he forced her to board a bus to Ngodini. On arrival at his residence he again had sexual intercourse with her on two occasions without her consent. The police arrived the next morning and appellant was arrested.

[5] The complainant's brother K[…] and sister N[…] testified. K[…] testified that he met the appellant and complainant on the 28th and he realized that they were arguing. The appellant looked scared and asked that she accompany him to his place. He spoke to the appellant who assured him that he would apologize to the complainant. K[…] testified that he was on another errand. He promised complainant that he would be back in five minutes to fetch her. On his return both appellant and complainant had disappeared. He looked for them but did not find them. He tried calling her but she did not answer. He reported the incident to her family and N[…] informed him at night that they located the complainant. N[…] testified that after receiving a report from K[…] she spoke to the complainant around midnight of the 28th when the complainant reported that she was somewhere in the bushes in the company of the appellant. After the complainant arrived home from work on 29th day she reported the rape and assault to her. When the complainant did not return from work the following day they reported the matter to the police, which led to appellant's arrest on 31st. Mrs Ngobeni, a nursing sister also testified about her medical examination of the complainant. Although she could not say that the complainant was raped, she recorded her findings. The complainant's vaginal orifice was swollen and she had other injuries on the body, abrasions on the right leg, and on the left index finger; she complained that she had been throttled and was assaulted on the chest with a fist and both legs looked swollen.

[6] The appellant denied the incidents of 28 and 29 April 2010. He testified that the complainant had accused him of infidelity and that they had separated as a result thereof. However even though they were no longer living together they continued to see each other.

He testified that the charges against him were false and that the complainant had informed him during the trial that he was being disciplined because his family did not approve of her. On 30 April 2010 he was called by the complainant because she wanted him to buy food for the child. He proceeded to her work place at about 14h00 where she demanded to be given money and he refused to give it to her. He later went to his residence. In the evening the complainant arrived, they spent time relaxing and the complainant slept over. They had consensual sexual intercourse at night and during the morning. They were awoken by the police and he was arrested.

The appellant called two witnesses. V[…] M[…], appellant's neighbour and friend testified that the complainant and appellant used to see each other and the appellant would leave his house keys with him for the complainant. Even though they were separated and during the appellant's incarceration she would visit the appellant's residence to check on the house. The complainant informed him that the charges were laid against the appellant in order to discipline his family. B[…] M[…] testified that the appellant and complainant never parted and that they continued seeing each other even though there was once a fight about another woman who was involved in a relationship with the appellant.

[7] It was trite that in criminal proceedings the State had to discharge its onus beyond a reasonable doubt. An accused person was not obliged to convince the court of the truthfulness of his version, if it was reasonably possibly true, he was entitled to the benefit of the doubt and to an acquittal. It was also trite that unless there was a demonstrable material misdirection by the trial court of the findings of fact, a court of appeal had limited powers to interfere with such findings of fact; S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 E-F.

[8] The magistrate made the following findings:

1. That the complainant was corroborated by her brother K[…] in as far as it concerned the events of the 28th that preceded the alleged rape. He went to

complainant's house after receiving a call from her and found her in the presence of the appellant. He observed that there was an argument, the appellant promised to apologize to the complainant;

2. The complainant was corroborated by her sister N[…], that when she managed to contact the complainant at around 24h00 on 28th the complainant reported that she was with the appellant walking somewhere in the bushes. Furthermore that on the 30th the complainant called that they wait for her at the bus stop and to report to the police if she failed to arrive at home;

3. The complainant sustained injuries as recorded in the J88 medical form and according to the evidence of nursing sister Ngobeni.

This corroboration gave credence to the testimony of the complainant and the magistrate correctly in my view rejected the complete denial by the appellant of the allegations against him of the 28th and 29th. It further corroborated the version of the complainant regarding the incident of the 30th. When she failed to return home that evening the family reported to the police and they went in search of her.

[9] The magistrate correctly also rejected the version of the appellant and his witnesses. If indeed the complainant followed him to his residence and that they had gone out to buy food and had a pleasurable evening, watching a movie and making love, then there was no reason for the complainant to have requested the police to be called. Furthermore the magistrate correctly found that his witnesses' testimony did not assist the appellant in any material respect.

[10] Both counsel were requested by me to prepare additional heads to address the issue of whether there had not been a duplication of charges on convictions. In S *v Radebe 2006 (2) SACR 604 (OFS)* Ebrahim J at *607 h-j* and *608a,* referred to R v Van der Merwe 1921 TPD 1 where Bristowe J, stated the following:

"Generally speaking, the law is one act one offence, or rather, perhaps, that one offence is constituted by the outcome of one criminal intent in the accused's mind, and that it is carrying of that intention into effect which constitutes the criminal act. The difficulty is that in so many cases acts are closely connected with each other; they cannot be separated and one attributed to one intention and one to another. Often they follow closely on one another, and often the actual crime consists of a series of acts which cannot be disconnected, so that the difficulty is to decide where is the boundary line at which the series attributable to one criminal intention ceases and the series attributable to another criminal intention begins. What we have to do is to find a satisfactory test which we can apply for the purpose of determining the question, namely what is the part of one criminal act and what must be attributed to another. "

and at *609b*

" *The rule against duplication of convictions is a rule primarily aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused person in the form of double jeopardy, that is, being convicted and punished twice for the same offence when in fact he or she has only committed one offence"*

[12] I am of the view that there was a duplication of convictions in respect of the rape charges committed on 28th and 29th and those committed on the 30th. The acts were preceded by a demand that they get back together again and when complainant refused there were threats to kill her, she was throttled, assaulted and there was a threat to commit suicide made during the incidents of the 28th and 29th and on the 30th. The rape incidents fell in between. I am not satisfied that the evidence if viewed holistically justifies four rape convictions. In my view the State proved two incidents of rape and only two convictions of rape were justified and the convictions and sentence have to be set aside and substituted with a conviction on two counts of rape.

I am further satisfied that the court a *quo* when sentencing the appellant took all

the relevant facts into account and shall not reconsider them again.

[13] In the circumstances the following order is given:

The appeal on conviction and sentence in respect of the rape charges is upheld and substituted with the following convictions and sentence;

1. The appellant is convicted of two counts of rape committed on 28th and 30th April 2010 and is sentenced to the following:

   15 years imprisonment for the rape committed on 28 April 2010 and,
   20 years imprisonment for the rape committed on 30 April 2010. The term of imprisonment of 15 years is to run concurrently with the 20 years imprisonment for the rape committed on the 30 April 2010

2. The appeal in respect of count 2 (Attempted murder) is dismissed and the conviction and sentence are confirmed.

TLHAPI V.V
(JUDGE OF THE HIGH COURT)

I agree,

MALINDI P.G
(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	10 FEBRUARY 2014
JUDGMENT RESERVED ON	10 FEBRUARY 2014
ATTORNEYS FOR THE APPLICANT	THE LEGAL AID SA
ATTORNEYS FOR THE RESPONDENT	THE NATIONAL DIERCTOR OF PROSECUTIONS