IN THE NORTH GAUTENG HIGH COURT. PRETORIA

(THE REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: A771/12

In the matter between:

FANUEL MTHOMBENI 1st APPELLANT

FATHER MOLOTO 2nd APPELLANT

and

THE STATE RESPONDENT

Appeal heard: 20 August 2013

JUDGMENT

MPHAHLELE J

[1] The appellants were arraigned in the regional court, Pretoria, on a charge of rape. It was alleged that on or upon 2 December 2006 and at or near Olifantsfontein, the appellants did unlawfully and intentionally have sexual intercourse with J[...] L[...] ("the complainant") without her consent. The appellants were convicted of the charge preferred against them and they were sentenced to life imprisonment. The appellants appeal against both the conviction and sentence imposed by the trial court. In regard to conviction, the central issues in this appeal are whether the state proved the guilt of the appellants beyond reasonable doubt. In particular, the appellants contend that the state failed to establish that the complainant was raped, and that the appellants were her rapists.

[2] The state adduced the following evidence: The complainant testified that on 2 December 2006, she attended a party in an area known as L & J with her cousin, S[...]. S[...] left the party to check on her child, who was at home. When she noticed that S[...] had not returned, the complainant decided to leave the party as it was getting dark. The appellants, who were also at the party, asked whether she was leaving. The appellants then accompanied her and she walked between them. Whilst walking the 2nd appellant grabbed her right hand and put his hand on her mouth whilst the 1st appellant held her left hand and also grabbed her throat. The 2nd appellant then instructed the complainant to drink something out of a green bottle, she only sipped a little of the substance. She was taken to what was referred to as 'the mountain'. There, the 2nd appellant violently plucked at her skirt, tearing it in the process of pulling it down. He then pulled her panties down. At that moment they were joined by 2 other men who are unknown to the complainant. The 2nd appellant pushed her and then she fell on her knees; he then raped her. She informed him that she was 3 months' pregnant. All four men took turns in raping her, each raped her three times. Her life was spared because they believed that the substance that she took drugged her and she would not be able to recognise them. Upon arrival at her home, she reported the rape ordeal to her neighbour, L[...] M[...] and specifically

informed him that the appellants are the ones who raped her. Then L[...] accompanied her to her home and reported the ordeal to her husband. Then S[...] was summoned to accompany her to the police station to lay a complaint against the appellants. She sustained injuries to her knees and had a sore throat. She sustained no genital injuries, she only had pains in her womb.

[3] Under cross-examination, the complainant stated that all four men penetrated her thrice each and ejaculated inside her. She testified under crossexamination that it was dark at the party but she recognised the appellants as they were close to her. She further testified that the appellants even approached her and S[...] when they arrived at the party and had a chat with S[...]. The State submitted that it was not able to secure S[...] to testify as a witness as she could not be traced.

[4] P[...] M[...] M[...] (J[...]'s husband) testified that on 2 December 2006 the complainant only came back home the following morning (in the company of L[...] M[...]) after attending a party with S[...]. The complainant reported to her that four men raped her but she only recognised the two appellants (the appellants who are well known to him). She was dirty and her clothes were torn.

[5] L[...] M[...] testified that on 2 December 2006 at approximately 05h45 the complainant came to his place of residence. She was sobbing and he noticed that her knees were bruised and her clothes were very dirty. She then informed him that she was raped. She identified the appellants as part of the men who raped her.

[6] Dr. Cornelius Petrus Notnagel testified that he examined the complainant on 3 December 2006. Her clothes were dirty and full of sand and mud. He found that the complainant had abrasions on both her knees. She informed him that the perpetrators gave him something to drink. He concluded that she was roughly handled by the perpetrators. He confirmed that the complainant was about 12 weeks' pregnant. On examination, he noted that she did not have any scarring, tears or bleeding on her vagina. Notnagel further testified that if there was penetration without her consent, it would not automatically follow that vaginal injuries would be present. Where she alleged that she was raped twelve times he would have expected to see some injuries. Lubrication and the time lapse since the rape and his examination could, however, influence the visibility of some injuries, for instance swelling.

[7] The 1st appellant denied that he raped the complainant. He testified that on 2 December 2006 he never attended the party as alleged by the complainant and he was never in the company of the 2nd appellant. He testified that at 14h30, after work, he went with Chauke to Johannesburg to collect furniture for delivery in Potgietersrus. Chauke has since passed away and it is only him and Chauke who knew about the trip to Potgietersrus. He does not know exactly where the furniture was delivered. Under cross-examination, he testified that he knew the complainant very well to the extent that tie could identify her if he could meet her in the street at night.

[8] The 2nd appellant testified that he attended the party at L & J on 2 December 2006. He arrived at the party at 14h00 and left at 18h00. He then went to a tavern where he left at 22h00 for home. He went home with Enos Malatji as his wife had gone home in Burgersfort. Whilst sleeping with Enos, the 1st appellant came to his home and informed him that his sister had informed him that there was a woman who was intending to have the 2nd appellant arrested on allegations of rape. The 2nd appellant and Enos then went to Clifford's place. Clifford informed them that the complainant was seen in the company of the 1st appellant on 02 December 2006. He confirmed that he knew the 1st appellant very well. He did not see the complainant at the party or the tavern. He saw the complainant for the first time in court. The 2nd appellant failed to call Enos as a witness.

[9] On appeal, the evidence of the complainant was attacked. The appellants' counsel submitted that the trial court erred in rejecting the evidence of the appellants as false. It was further submitted that the trial court erred in not attaching a negative inference to the fact that the State failed to call S[...] as a witness and further the omission to tender any DNA evidence against the appellants. The record of the trial proceedings supported the findings of the trial court that the complainant's evidence was satisfactory in all material respect. The trial court analysed and weighed the evidence of the State witnesses *vis a vis* the evidence of the appellants and correctly found that the complainant was raped and further that the complainant correctly

identified the appellants as two of the men who had raped her.

[10] The trial court was alive to the importance of probabilities in the evaluation of evidence given by a single witness, and to the fact that however credible a witness may seem, evidence concerning the identity of an accused may be unreliable. The trial court evaluated the complainant's evidence critically and with caution, and correctly found corroboration in the evidence of the other witnesses. In particular, the first appellant testified that he knew the complainant well, since she used to visit S[...], his neighbour; further, he had met her at the tavern. The 2nd appellant also testified that he knew the complainant. Molopo's undisputed evidence was that the complainant had told him early on the Sunday morning that she had been raped by the appellants and two other unidentified men. Similarly, the evidence of Notnagel corroborates that of the complainant - he testified that she presented with abrasions on both knees, her clothes were dirty and in his view, she was a rape victim that had been roughly handled by the perpetrators. While it is correct that in his evidence Notnagel stated that he would have expected to see vaginal injuries, the fact that he observed none did not mean that the complainant did not have intercourse without consent. The trial court was further correct, in my view, in rejecting the evidence of the appellants as false beyond a reasonable doubt. I cannot find any fault with regard to that finding and it follows that the rape conviction was proper and the appellants were correctly convicted.

[11] I now turn to the appeal against the sentence. The appellants contend that they were charged with rape, with reference to s 51 (2) of the CPA. The significance of this is that s 51 (2), in the present circumstances, would prescribe a minimum sentence of imprisonment for not less than 15 years. The provisions of s 51 (1), on the other hand, read with Part I of Schedule 2, provide for a minimum sentence of life imprisonment in the case of rape in circumstances where the victim was raped more than once whether by the accused or any co-perpetrator. The court a *quo* clearly had this provision in mind when it sentenced each of the appellants to life imprisonment.

[12] The record indicates that on 4 December 2006, the appellants appeared before a magistrate other than the magistrate who conducted the trial, and that "Minimum sentence provisions as per s 51 and s 52 of Act 105 of 1997 explained at length and understood." Precisely what was explained and what was understood is not clear. In particular, it is not clear whether at that stage, it was explained to the appellants that they faced the prospect of a sentence of life imprisonment if convicted. While it is correct that when the State intends to rely on the sentencing regime created by s 51 that this intention be brought to an accused's attention at the outset so that the accused is properly forewarned of the possible consequences, it ought to be recalled that in the present matter, both appellants were legally represented throughout the trial, in circumstances where the it must have been clear to them and their representatives that despite the single charge of rape that each of them faced, the State's case was that the complainant had been raped by four men, two of whom were allegedly the accused. It follows that the State's case was clearly one in which it would be contended ultimately that the rape had occurred in circumstances where the complainant had been raped more than once, thus attracting the prospect of a life sentence. In these circumstances, the sentence of life imprisonment imposed on the appellants does not stand to be set aside on the ground that they were denied a fair trial on account only of any failure to advise them of the potential consequences posed by s 51.

[13] In so far as the appellants contend that their sentence is disproportionate to their offences and the interests of society, I now turn to the evidence led by the appellants in mitigation of sentence. At the time of the commission of the crime, the 1st and 2nd appellants were 27 and 26 years old respectively. Both appellants were gainfully employed. Both are married each with 2 children. Both are first offenders. The appellants spent 2 years and 3 months in prison awaiting the finalisation of this matter. Likewise I must take into account those factors which aggravate the offence. It is clear from the accepted evidence that this was a gang rape and each of the 4 men concerned, the appellants included, penetrated the complainant three times. The complainant was pregnant at the time of the rape ordeal. The appellants have shown no sign of remorse during the hearing proceedings. Rape of women and children is rife and should not only be deplored but also severely punished. Women and children who are vulnerable require protection from these callous perpetrators of rape. In S *v Dladla* 2013 (1) SACR 288 (GSJ), a sentence of life imprisonment was imposed on two young appellants who were part of a gang of eight that gang raped and assaulted a 14 year-old complainant. Similarly, in S *v Mosia* 2012 (2) SACR 537 (FB), a sentence of life imprisonment was upheld in circumstances where the court had found that the gravity of the rape incident and the callous

disregard for the victim's bodily integrity and emotional feelings outweighed any circumstances favourable to the appellants. In my view, the sentence imposed by the trial court is not vitiated by any irregularity or misdirection, nor is it disturbingly inappropriate.

[14] It follows that the appeal stands to be dismissed, and the convictions and sentences confirmed.

The following order is made:

1. The appeal is dismissed.

S.S. MPHAHLELE

JUDGE OF THE HIGH COURT

I agree

A VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT