IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A136/21

DELETE WHICHEVER IS NOT APPLICABLE

(1)REPORTABLE: NO

(2)OF INTEREST TO OTHERS JUDGES: NO

(3)REVISED

Mlhapi ..... DATE 11/01/2022

SIGNATURE

In the matter between:

FANI NGAKE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

BALOYI AJ

[1.] This is an appeal against conviction and sentence handed down in the Regional Court Division of Bronkhorspruit on 26th of June 2013 against the Appellant. The Appellant together with two co-accused (accused 1 and 2) were charged for unlawfully and intentionally committing an act of sexual penetration with a female person, J[....] N[....] M[....] a 25 year old by inserting his penis in her vagina without her consent.

[2.] They pleaded not guilty to the charge. Formal admissions in terms of section 220 of the Criminal Procedure [1] were reduced to writing. The Appellant admitted having consensual sex with the complainant alleging that she is a prostitute (Magosha). They were found guilty of the charge and sentenced to life imprisonment in terms of section 51 (5) of the minimum sentence Act[2]. The court a *quo* found that there were no substantial and compelling circumstances placed before the court that the minimum sentence should not be applied.

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[1] 51 of 1977

[2] section 51(2) (a)(i) of the Act 105 of 1997

AD EVIDENCE

[3.] N[....] M[....] , the complainant testified that the incident occurred on 29/30 September 2012 at Ext. 5 Zithobeni at about 19h00. She was coming from her sister in-law when she was grabbed by two males who closed her mouth so that she could not scream. She was forced and dragged by accused 1 however, she could not identify the other perpetrators. They took her to accused 1's place where Accused 1 put on a condom and had sex with her without her consent. Later two men entered the room and raped her without a condom. She could not see them as it was dark. Accused 1 had sex with her again after the other two were done. They all had sex with her without her consent. The two left in the morning.

[4.] She left in the early hours of the morning and went to Zithobeni police station where she was taken to Bronkhorspruit police station and later to the doctor for examination. She testified that she took the police to accused 1's place for arrest. The complainant could not identify the Appellant as one of the perpetrators. It was put to her that the Appellant and the co- accused had sex with her as she agreed to and demanded money for her services. They agreed to pay her later as they had used their money to buy beers. She denied that she agreed to have sex with them and never asked for money.

[5.] The second witness was Sergeant Mahlangu, she testified that she was working at Bronkhorstspruit police station. On the morning of 30 September 2012 she was on duty when The complainant came to lay a charge. She testified that

she was confused, hopeless and very tired. She testified that the complainant did not smell of any alcohol.

- She reported the matter to the third state witness Constable Desmond Nodumiso Matome, attached to the South African Police Service. On the night of the 29th September 2012, he was on duty at Ezithobeni contact point. They normally receive complaints at their sub-station. He testified that around 03h00 30 September 2012 the complainant came to report a rape. They took her to Bronkhorspruit police station to report her case where she was assisted by a female colleague. He testified that the complainant did not look good, her eye looked injured.

[6.] The next witness was Emily Ramollo, she testified that the complainant was her sister-in-law. She saw her on the 29 September 2012 around 17h00 in the afternoon. She testified that the complainant was in good condition when she left her.

APPELLANT'S TESTIMONY

[7.] The Appellant was at the tavern with the two co-accused drinking and dancing. Accused 2 went outside and when he came back he told them that the complainant is joining them. They were together and had beers while dancing together when they were advised that the tavern was closing so they went outside. They suggested going to accused 2's place of residence but decided not to go as it was too far and there was no electricity. They went to accused 1's place and upon arrival they played music. The complainant told them that she is selling sex, she is a prostitute. They told her that they do not have

money as they used it to buy alcohol at the tavern. They offered to pay her later for sex. Accused 1 was the first one to have sex with the complainant, Accused 2 followed and he was the last one. During cross examination he denied that the complainant was dragged and strangled. He testified that she went there voluntarily from the tavern to Accused 1's place. The complainant left at Accused 1's place at around 04h00. He denied raping the complainant and stated that it was voluntarily and they all agreed to pay her later. Their version was that they agreed from the tavern to go with complainant and she offered them sex in exchange for money. They all denied raping the complainant.

[8.] The next witness Nomvula Mashiane, for the appellant, who testified that she knows all the accused. She saw the three accused arriving at the tavern. She testified that the complainant was already drunk when she arrived at the tavern at 23h00. She testified that she was in the company of the three accused at 02h00 am when they left. N[....] was walking voluntarily and followed the three accused including the Appellant. She testified that Accused 2 was the first one to leave with the complainant, after Accused 1 followed with the Appellant and the tavern closed immediately after they left.

[9.] The next witness, Elizabeth Mampa testified that she knew the accused as they were her customers. She is the owner of cola Park Tavern. She testified that the complainant arrived at 23h00 at the tavern and joined the three accused. She testified further that they all had alcohol together moreover, she observed that the complainant was having alcohol but not drunk. She testified that the

three accused were not violent at the time when they were in her presence. She testified that she did not see what was happening outside.

ANALYSIS OF EVIDENCE

[10.] The complainant is a single witness in the offence of rape. It is trite that the court should exercise the cautionary rule when considering her evidence. **S v Artman and another**[34] it was held that the exercise of caution must not be allowed to displace the exercise of common sense. The complainant testified that she was dragged by the two men one of them being Accused 1 however, she could only identify Accused 1. The court *a quo* considered the evidence of her sister in law that the complainant was sober. The court took into account the injuries as appearing on the J88 form which corroborates the complainant's evidence of bruises on the neck, swelling on the private parts of the complainant.The court in **S v Sauls & Others**[4] stated:

> "*There is no rule of thumb or formula test when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether is trustworthy and whether despite the fact that there are shortcomings or defect or contradiction in the testimony, he is satisfied that the truth has been told. The cautionary referred to be Dr. Devilliers JP in 1932 may be a guide to a right decision but it does not mean (the appeal must succeed if any criticism, however slander, of the witness evidence were well founded. "*
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> *"It is trite that the court of appeal should refrain from lightly interfering with the credibility findings of a trial court which presumed to be correct. This is so because the trial court had the benefit of being steeped in the atmosphere of the trial court and observing and hearing the evidence first-hand. The trial court is therefore "in the best position to determine where the truth lies."*[5]

[11.] Counsel for the Appellant submitted that that the court should look into the

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[3] 1968(3) SA 340 at page 341(B-C).

[4] 981 (3) at page 180 – para D to F.

[5] Mvana and Another v S 2018 ZAECGHC18 at para 13

following: factors which the court did not consider;

- The complainant was comfortable testifying in open court even if it was explained that the case was of sexual nature in addition, the complainant was confident to testify in open court;

- The street in which the complainant was dragged is usually busy but on the evening of the incident there was no one on the street when the complainant screamed. He submitted that someone could have noticed and assisted the complainant.

- The complainants injuries were not serious despite having been raped four times.

[12.] The submission by the Counsel does not take argument any further in that if the complainant testified in open court does not mean she was not raped, she was brave enough to face her fears and perpetrators. The court a *quo* found that she was a credible witness. She testified that she was dragged and it was already dark during that time, having to suggest that there was no one to help; the complainant did not have control over the situation. The fact that the injuries on her private parts are not serious the argument does not have basis, it is common cause that they all had sex with her on the date. The court in **S v Gentle**[6] found that: "*It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complainant and which renders the evidence of the accused less probable, on the issue in*

[6] 2005 ZASCA 26.

dispute."

[13.] It is my considered view that the complainant's evidence is corroborated by J88. The evidence of Mrs Mamba and N[....] does not assist the Appellant and the co-accused with regard to what happened after they left the tavern. The court *a quo* was correct in accepting the evidence of the complainant and not finding that the Appellant's version was probable. I therefore find that the court *a quo* was correct in convicting the Appellant.

AD SENTENCE

[14.] The Appellant was sentenced to life imprisonment in terms of the Minimum Sentence Act[7]. The court *a quo* did not find the Appellant's personal circumstances as compelling to deviate from the minimum sentence. The Appellant gave his personal circumstances, that he was 22 years old, he was employed as a general labourer where he earned R 200.00 per month, he is single, has children and The Appellant has grade 9 education. This was submitted that the following should be accepted as compelling circumstances.

[15.] Section 51[8](3)(a A) When imposing a sentence in respect to any offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

[7] Act 105 of 1997.

[8] Minimum sentence Act 105 0of 1997

i. The complainant's previous sexual history; ii. an apparent lack of physical injury to the complainant; iii. an accused person's cultural or religious beliefs about rape; or iv. any relationship between the accused person and the complainant prior to the offence being committed.

[16.] The court a *quo* considered the seriousness of the offence. The minimum sentence was placed in emphasis on how serious the crime is. The court *a quo* did consider Part 1 of Schedule 2 that as a part of the minimum sentence Act, where rape committed in the circumstances where the victim was raped more than once, whether by the accused or any co-perpetrator or accomplice by more than one person, where such a person acted in *execution of furtherance of a common purpose or conspiracy*[9]*. "It was evidence of the complainant that she was dragged to the house by accused 1 and that later on the other people also entered and had sexual intercourse'.* Our courts will consider each case on its merits, the circumstances of the offence and the seriousness. It is clear from the conduct of the Appellant and co-accused that they acted in common purpose in raping the complainant. Snyman elaborates that[10]—

> *"the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others". These requirements are often couched in terms which relate to consequence crimes such as murder. The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a*

[9] Page 173 of the record.

[10] Snyman Criminal law 5 ed (LexisNexis, Durban 2008 at 265.

prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind. It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the surrounding circumstances from which the inferences are sought to be drawn must nevertheless be proved beyond reasonable doubt. A prior agreement to commit a crime may invoke the imputation of conduct, committed by one of the parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the other definitional elements of the crime, such as unlawfulness and fault, criminal liability may in these circumstances be established.[11]**"**

[17.] The court in **Baba and Others v S**[12][13] held that *"One can never leave out of account, as the SCA recently emphasised again in S v Hewitt* ***2017 (1) SACR 309*** *(SCA) at para 9, that rape is "a horrifying crime" and "a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim", and as "a very serious offence" which is "a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim". In the present instance one is dealing with gang rape, which is one of the most horrific crimes imaginable and one for which the legislature has dictated that a sentence of life imprisonment must be imposed unless there is substantial and compelling reasons to do otherwise.*

[18.] I therefore find that the court was correct in not finding that there are substantial and compelling reasons in respect of the Appellant to deviate from the minimum sentence.

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[11] S v Tshabalala and Another 2020 (2) SACR 38 (CC) at para 46 to 49.
[12] [2019] ZAWCHC 40 para 40 and 41.
[13] All SA 556(GJ) para 35.

[19.] The Court in Ndlovu v S[13] *held that* in order for the minimum sentencing provisions to be triggered, there must be an actual conviction of rape of the co-perpetrator/s. *A trial court is obliged to sentence an accused who appears before it on the basis of the facts which it found to have been proven when convicting the accused. The Mahlase dictum, however, gives rise, with respect, to the illogical situation that a trial court, having found beyond reasonable doubt that the complainant was raped more than once by two men and having convicted the accused accordingly, must, for purposes of the Act, disregard that finding and proceed to sentence the accused on the basis that it was not in fact proven that she was raped more than once; that the provisions of the Act relating to the imposition of the prescribed minimum sentence of life imprisonment are therefore not applicable; and that the minimum sentence applicable in terms of the Act is one of only ten years imprisonment.*

[20.] The Constitutional Court in *Tshabalala*[14] *(* has now conclusively put paid to the instrumentality argument. Mathopo AJ held as follows on this point:*The instrumentality argument has no place in our modern society founded upon the Bill of Rights. It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and*

[14] At para 80.

dominance over the women, just by their presence in the room. The perpetrators overpowered their victims by intimidation and assault. The manner in which the applicants and the other co-accused moved from one household to the other indicates meticulous prior planning and preparation. They made sure that any attempt to escape would not be possible.

[21.] The court a *qou* found the Appellant and his co-accused guilty of rape. They gang raped the complainant and do not show remorse by stating that she was a prostitute.

[22.] I make the following order;

- Appeal on conviction and sentence is dismissed.

BALOYI-MBEMBELE

(ACTING JUDGE OF HIGH COURT)

I agree,

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**14 OCTOBER 2021**
JUDGMENT VRESERVED ON	**:**	**14 OCTOBER 2021**
ATTORNEYS FOR THE APPELLANTS	**:**	**LEGAL-AID OF SA**
ATTORNEYS FOR THE RESPONDENTS	**:**	**DIRECTOR OF PUBLIC PROSECUTIONS**