IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 624/12

In the matter between:

ZANE ALLEN MDLWEMBE NXELE Appellant

and

THE STATE Respondent

JUDGMENT

Vahed J:

[1] The appellant was indicted in the court *a quo* before Mogwera AJ, sitting with two assessors, on four counts. On count one he faced a charge of robbery with aggravating circumstances and on counts two, three and four he faced charges of rape. At the conclusion of the trial he was acquitted on the first count but found guilty on the three counts of rape and sentenced to an effective term of 15 years' imprisonment. His appeal serves before us against conviction only, leave in that regard having been granted by the court *a quo*.

[2] The respondent led the evidence of five witnesses in support of its case against the appellant. Those witnesses were the two complainants, Miss M[…] L[…] and Miss T[…] H[…] N[…], Lungisani Mdluli ("Mdluli"), Constable Zwane ("Zwane") and Warrant Officer Zaca ("Zaca"). Their evidence can be collectively summarized.

[3] The two complainants, Miss N[…] and Miss L[…], were employed at the Oasis Steers Restaurant in Cato Ridge. On 8 May 2010, after their shift ended at 20h00, they were making their way home by firstly accepting a lift from a customer who left them at the overhead bridge over the N3 National Highway in Cato Ridge in the vicinity of the Dunbar Shopping Centre. From the bridge they had to make their way down a steep embankment in order to get to a footpath which would lead them to their homes. They held hands to support each other while they negotiated their passage down this bank and while doing so they were accosted by three assailants, one of whom was armed with a firearm. Startled by this they both slipped and fell on their backs. The three assailants approached them and demanded cellphones and money from them and the person armed with a firearm directed his companions to search the complainants. He then covered Miss N[…]'s face with either a jacket or a jersey and she was thereafter raped by one of the assailants. During the course of this rape she repeatedly shook her head which caused the object covering her face to become partially dislodged and she was thereafter able to see with one eye which became exposed in that process. Being dark the lighting was poor although visibility was assisted by the lights emanating from the Shopping Centre across the Highway. At some stage the first of her rapists stopped and one of the other assailants then commenced raping her and while this was unfolding she was able to observe

another of the assailants raping Miss L[…]. She recognized Miss L[…]'s rapist. While the second of the rapes was being perpetrated upon Miss N[…] a motor vehicle travelling on the N3 National Highway executed a U-turn and drove past them and during that manoeuvre the lights from that vehicle illuminated the scene and it was then that she was able to identify the person raping her at the time. The actions of that motor vehicle also disturbed the assailants who fled. She identified the person who raped Miss L[…] as one Sibonelo Shezi and the second of her rapists as someone she knew as Mdlwembe. He was the one armed with the firearm.

[4] After the assailants fled the complainants took a few moments to compose themselves and then decided to head in the direction of the Dunbar Shopping Center in order to make a phone call to report what had happened to them. A passing motorist assisted them and summoned the police. While waiting there for the police a security guard at the premises approached them and they informed him that they had been accosted and robbed. The security guard went off because apparently he had seen someone lurking in the vicinity. While the two complainants were alone Miss N[…] told Miss L[…] that she knew the identity of Miss L[…]'s rapist and identified him to her as Sibonelo Shezi. At that stage she said nothing about her identification of the second of her assailants. The security guard returned with Shezi and they identified him as one of the robbers. At that stage he was in possession of some of their personal belongings which included toiletries and Miss N[…]'s sling bag.

[5] The police arrived and they were taken back to the scene of their attack where some of their other personal belongings were recovered and they then went

home where, according to Miss N[…], she reported the incident to her mother and in that report identified Mdlwembe as one of her rapists. Miss L[…] was unable to identify any of the assailants because they were unknown to her. During her ordeal the assailants made no attempt to cover her face.

[6] On the following day detailed statements were taken from them and they were examined by the District Surgeon, Dr Rajpaul. His reports in respect of his examination of both complainants were received in evidence by consent. His examination of Miss L[…] recorded her allegation that she was raped by an unknown black male and he concluded that there was evidence of forced vaginal penetration. With regard to his examination of Miss N[…] he recorded that she had informed him that she had been raped by two known black males and, after examination, concluded that there was evidence of forced vaginal penetration.

[7] During her evidence Miss N[…] said that she knew the appellant as Mdlwembe and that of the three assailants that evening he was the one in possession of the firearm. She said that she knew Mdlwembe from his presence in the area where she lived and she had in fact seen him earlier in the day when she was on her way to work. He was sitting at his house with some other young men and one of that group passed a disparaging remark about her buttocks as she walked past.

[8] Mdluli testified that he was friendly with both complainants and had heard about their unfortunate experience. He had also heard that the appellant, identified to him only as Mdlwembe, was implicated in the incident. The appellant was known to

him as a frequent visitor to one of the homesteads in the area where he lived. Mdluli testified that on 2 February 2011 he was in central Durban, in Queen Street, when he saw the appellant who was then occupied as a street vendor. He secured the assistance of the police and also telephoned Miss N[…] telling her that he had come across the appellant. After some time she made her way to Queen Street and joined him. The two of them, together with two police officials, one of which was Constable Zwane, then approached the appellant who was pointed out to the police by Miss N[…]. The appellant was immediately arrested. After it was put to him during cross examination, he denied that the appellant was assaulted by Zwane. Zwane's evidence tallied largely with that of Mdluli.

[9] The investigating officer, Warrant Officer Zaca then filled in the rest of the tale. During the course of his investigations and his search for the appellant he was looking for a person known as Mdlwembe. He interviewed both the appellant's father and mother who did not dispel the suggestion that he was known as Mdlwembe and that he was frequently in the area where he was seen by Miss N[…] and by Mdluli.

[10] In his defence the appellant denied that he was known as Mdlwembe and denied any knowledge of the incident. He denied ever being in the vicinity of the area where Miss N[…] and Mdluli resided. The nub of his defence was a challenge to the identification by Miss N[…] as being one of the assailants that evening.

[11] At the conclusion of the defence case the court *a quo* called the evidence of L[…] N[…], Miss N[…]'s mother. She confirmed the report made to her on the evening of the incident by Miss N[…] and her identification of Mdlwembe during that

recount of the events. She confirmed also that the appellant was known in the district and was known to her as Mdlwembe. When it was put to her that the appellant was not known as Mdlwembe, that statement was met with a reaction of incredulity on her part and she was quite adamant and positive that he was known in the area as Mdlwembe.

[12] On that evidence the appellant was convicted on the three counts of rape. In respect of his raping of Miss N[…] he was convicted as the direct perpetrator and for the other rape on Miss N[…] and the rape of Miss L[…] he was convicted on the doctrine of common purpose as from the evidence it was clear that he was one of the three assailants and that in fact his actions actively contributed to and assisted in the other two rapes.

[13] At the end of the trial it was common cause that the complainants had been raped and that aspect of the case was not placed in dispute. The only challenge was whether the appellant had been correctly identified as Mdlwembe by Miss N[…].

[14] During the course of the judgment in the court a quo Mogwera AJ indicated that she personally was not satisfied with the opportunity for identification made by Miss N[…]. In that regard she was overruled by the two learned assessors sitting with her who concluded that the opportunity for identification was sufficient and that the appellant was correctly identified as being one of the assailants and the second of Miss N[…]'s rapists that evening. Dealing with this aspect of the case I am respectfully of the view that the learned Acting Judge *a quo* was being overly cautious. On a fair reading of Miss N[…]'s evidence it is clear that the ambient

lighting and the circumstances under which she was raped afforded her sufficient opportunity to make a positive identification of at least two of the perpetrators that evening. She was able to see Miss L[…]'s rapist and was also able to see and identify the second of her rapists after the obstruction to her vision had been sufficiently removed. The opportunity was reinforced by the fact that the two assailants, that is Shezi and the appellant, were both known to her.

[15] The only question that remains then is whether the appellant, known to her as Mdlwembe, was one of the assailants and reliably identified.

[16] I find that her identification of him was reliable for a number of reasons. The first of those is the fact that she identified her assailant as Mdlwembe when she reported the events to her mother. I am mindful of the fact that that report can never be corroboration but it is a relevant factor when one examines Miss N[…]'s evidence for consistency. It is true that she did not mention her assailant during the initial discussions after the event with Miss L[…] but, in my view, that is understandable. During those early hours after such a harrowing experience she did not talk about her personal experience but contributed to the identification of Miss L[…]'s rapist. When the first opportunity arose in comfortable surroundings, i.e. when she was at home that evening with her mother, she then reported as to what happened to her. I can raise no criticism of her in that regard.

[17] Another factor pointing to the reliability of Miss N[…]'s identification of the appellant is her report to the District Surgeon that the assailants that evening were "two known males".

[18] The identification is reinforced by Mdluli's evidence. One of the assailants that evening was identified to him only as Mdlwembe. There is no evidence of any detailed description been given to him and all he had to go by was the name. When some time later he was in Durban he identified the person he knew as Mdlwembe who, upon the arrival of Miss N[…], positively identified the appellant as one of her assailants. Add to that the evidence of Warrant Officer Zaca who confirmed that the appellant was indeed known in the district as Mdlwembe.

[19] That analysis leads me to conclude that Miss N[…]'s identification of the appellant as being one of the assailants that evening, notwithstanding that she was a single witness, was indeed reliable. But that is reinforced by this: during the course of argument Mr Khan who appeared for the appellant, submitted that he could not contend for any misdirection on the part of the court *a quo*. He was correct in that submission and, unless we are convinced otherwise, are constrained to accept the factual findings made by the court *a quo*.

[20] I also find it significant that it was only with regard to Ms N[…] that an attempt was made to cover her face and thus prevent identification. Ms L[…] did not know any of the assailants and it is safe to assume that they did not know her either. However, Ms N[…] knew the appellant and Shezi and, given her evidence of an interaction with the appellant that same morning, the inference is inescapable that the appellant knew her, recognised her, and for that reason covered her face to hinder identification by her.

[20] There remains one further aspect that requires some comment. After conviction and during the sentencing phase of the trial the appellant elected to make submissions from the bar through his legal representative. That submission went thus:-

> "I do submit that the offence is very serious. I have spoken to the accused about that. He has informed me that on that day he was drunk, but not in that he could not appreciate what was happening. He was in fact influenced by his friends, the two assailants who were with him on that day."

[21] The learned Acting Judge *a quo* elected to treat those submissions as an effort on the part of the appellant to secure a lenient sentence and not as a genuine demonstration of remorse or as a considered admission of guilt. She was undoubtedly correct in that regard. The question that arises is the degree of weight we ought to attach to that statement on appeal. While undoubtedly that statement forms part of the overall *res gestae* on appeal, it is not something that I have taken into account in order to dispose of the appeal. Like the learned Acting Judge *a quo*, I too choose to ignore that statement and have disabused my mind of it when considering the appeal.

[22] In the result I am of the view that the appellant was correctly convicted and the appeal is accordingly dismissed.

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Vahed J

I agree

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Ploos Van Amstel J

I agree

_____
Bezuidenhout AJ

Appearances:

For the Appellant:	I. Khan C/O PMB Justice Centre 183 Church Street Pietermaritzburg Tel: 033 394 2190
For the Respondent:	R. Sepeng The Director of Public Prosecutions High Court Building Pietermaritzburg Tel: 033 845 4400
Date of Hearing:	30 January 2014
Date of Judgment:	27 February 2014