IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A39/2016

17/11/2016

DELETE WHICH IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

_____ _____

Date Signature

In the matter between:

OUPA JOSIAS MAMETJA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

CHIDI AJ:

INTRODUCTION

[1] On 28 January 2016, Oupa Josias Mametja, the Appellant, then a 28 year old male, was convicted and sentenced to 10 years imprisonment by the Mokerong Regional Court, Mrs A Swanepoel, ("the trial court") for the rape of one S.M. a 22 year old woman ("the complainant").

[2] It was alleged that the Appellant contravened "the provisions of Section 3 read with Sections 1, 56, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters Act 32 of 2007), (Sexual Offences Act). Further read with the provisions of Sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977("CPA"). Further read with Section 51 (2) (b) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentence Act"). Further read with Section 120 of the Children's Act 38 of 2005. In that on or about 22 March 2015 and at or near Ga-Madiba in the Regional Division of Limpopo the said Appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, "S.M.,a 22 year old female person by inserting his penis into her vagina" (*sic*) without the consent of the said complainant.

[3] Section 51(2) (b) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, is applicable in that “the rape was committed in circumstances other than those referred to in Part I” (*sic*).

[4] The Appellant applied for leave to appeal which was duly granted.

[5] It appears from the record that the Appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that he was informed of the consequences of the prescribed minimum sentencing regime at the time when the charges were put to him.

THE RELEVANT FACTS

[6] The Appellant was convicted on the following factual matrix:

6.1. The complainant performed as a singer during the night at the Junction Joint Tavern. After the performance she spoilt herself with liquor, as a result of which she became moderately drunk. She left the Junction Joint Tavern at about 02:30 to join her friend, B.K. at Mosome Tavern. As it was late at night both of them could not go to their parental homesteads to sleep

because their parents are strict and would not open for them. B.K. contacted her boyfriend, the Appellant, requesting a place to sleep. Appellant accepted B.K.'s request that the two may sleep at his home. At the homestead of the Appellant the complainant and B.K., sat down and talked before sleeping. The Appellant suggested that the three of them sleep on the same bed but B.K. objected to that. Appellant then offered to sleep on the floor whereas the complainant and B.K. would sleep on the bed but that was also not acceptable to the complainant. The complainant then slept on the floor fully dressed while the Appellant and B.K. slept on the bed together.

6.2. While the complainant was asleep on the floor, the Appellant had sexual intercourse with her without a condom. As she was tired and drunk, she did not feel the Appellant when he undressed and penetrated her. She woke up when she felt someone on top of her breathing fast. She realized that her pair of trousers was down on her legs and her bra was loose. The Appellant was also not dressed.

6.3. She felt that there was a discharge coming out of her. It

appeared that the Appellant has ejaculated inside her. She did not give consent to the Appellant to have sexual intercourse with her.

6.4. She asked the Appellant as to what he was doing; she immediately pulled B.K. by the leg to inform her that the Appellant had just raped her. She screamed in order to alert the Appellant's family members. Appellant's mother came to the room on hearing the noise. After hearing the report of the complainant, Appellant's mother chased the complainant and her friend, B.K., away from her homestead.

6.5. Complainant immediately from the Appellant's homestead went to the police station to report and lay charges of rape. Appellant followed her to the police station but returned when the complainant pelted him with stones. At the police station she was taken to Mokopane Hospital for medical attention.

6.6. The medical practitioner examined her and completed the J88 report (Medical Form) which was accepted as an Exhibit. The medical practitioner noted on the medical Form that there are no injuries to exclude anal penetration.

6.7. On the rape charge, the Appellant admitted that he had sexual intercourse with the complainant the night of the incident. His defence was that the sexual intercourse was consensual.

6.8. His version was that when he was in bed with his girlfriend, B.K., the complainant uttered the words "*the two of you should not do anything silly (sexual intercourse). If you do such I will jump onto that bed and you will do the very same thing to me as you will be doing to B.K.*" (*sic*). To him it was clear that she was interested in what the Appellant and his girlfriend were doing in bed. That the complainant while asleep pulled the Appellant by the leg and invited him to the floor. Appellant woke up thinking the complainant wanted a "chamber pot" to urinate.

6.9. However, the complainant started kissing her and fondled his testicles. He kissed her back and after he got an erection they had sexual intercourse. He was surprised that after the sexual intercourse the complainant woke up B.K. to inform her about what has just happened.

[7] B.K. also gave evidence and confirmed that while she was fast asleep in bed, the complainant woke her up to report that the Appellant has just raped her. She could not believe the story of the complainant for she knew that the Appellant would not do such a thing in her presence. She also confirmed that she went with the complainant to the police station.

[8] Appellant denied the allegations with regard to the rape.

[9] The Appellant's version was rejected by the trial court as not being reasonably and probably true and he was accordingly convicted as charged.

THE ISSUES FOR DETERMINATION

[10] This court is called upon to determine the following issues:

10.1. Whether the sexual intercourse between the complainant and the Appellant was consensual;

10.2. Whether the complainant was in a state that she could not give consent to sexual intercourse;

10.3. Whether the complainant when she said "*the two of you should not do anything silly (sexual intercourse). If you do*

such I will jump onto that bed and you will do the very same thing to me as you will be doing to B.K.", that was consent to sexual intercourse;

10.4. Whether the version of the Appellant is reasonably and probably true.

10.5. Whether the appeal court should interfere with the sentence imposed on the Appellant.

LEGAL PRINCIPLES

11. The offence of rape is defined in Section 3 of the Sexual Offences Act as:

> *"Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape."*

12. The above definition shows that the sexual act of penetration must have happened with the complainant's consent. Section 1(3) (*d*) of the Sexual Offences Act deals with the situation where as in this case there was inability to appreciate the nature of the sexual act. **Snyman**[1] states that:

> *"There is no valid consent if X performs an act of sexual penetration in*

[1] CR Snyman "*Criminal Law*" 6ed LexisNexis (2014) at355.

respect of Y if Y is asleep, unless, of course, Y has previously, whilst awake, given consent. The same applies to a situation where Y is unconscious. Paragraph (iii) of section (3) (d) provides further that consent is not valid if Y is "in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that Y's consciousness or judgment is adversely affected."

13. It is an undisputed fact that the complainant was tired and moderately drunk at the time she fell asleep in the Appellant's room. Her judgment was obviously impaired by the tiredness coupled with the liquor she drank.

14. At the time the Appellant had sexual intercourse with the complainant she was asleep. Though the Appellant is averse that the complainant consented to the sexual intercourse by inviting him to the floor to have sexual intercourse with him. The contention of the Appellant is startling in that when the complainant became aware of what was happening to her she asked the Appellant is to what he was doing. A fact which was never controverted.

15. The complainant is a single witness on the issue of sexual intercourse. Therefore her evidence must be approached with caution. However, in **S v Artman And Another**[2] it was held that the exercise

[2] 1968 (3) SA 339 (A) at 341B-C.

of caution must not be allowed to displace the exercise of common sense.

16. Common sense dictates that the situation in which the complainant found herself in could not have made her to immediately after the sexual intercourse with the Appellant to divulge that information to her friend, B.K.

17. The Appellant depicts the complainant as a person of loose morals; in that he states that she invited him to the floor, fondled his testicles and kissed him first. This is improbable taking in to consideration the circumstances of this case.

18. **Schwikkard**[3] states that:

> *"Probabilities must also be considered in the light of proved facts. It is, for example, possible to accept direct credible evidence even though this evidence conflicts probabilities arising from human experience or expert opinion".*

19. In **S v Monageng**[4] the court stated that it is proper to test the evidence against inherent probabilities as they play a critical role in the enquiry.

[3] PJ Schwikkard *et al "Principles of Evidence*" ed Juta (2015) at 569.
[4] [2009] 1 All SA 237 (SCA) at 242 para 13.

20. The evidence of the complainant that the Appellant had sexual intercourse with her is proven. Nonetheless, immediately after the sexual intercourse she wakes up B.K. not to say what you (B.K.) did with the Appellant I also just did it with your boyfriend. But she says "*you cannot believe it" (sic)*; the Appellant has just raped me.

21. When the complainant realized that B.K. did not believe her, she took another step by making noise to alert the Appellant's family members. She acted like any normal woman who finds herself in a helpless situation by screaming.

22. B.K., when told that her boyfriend had just raped the complainant she states that it would be impossible for the Appellant to have sex with another woman in her presence. But the Appellant proved her wrong as his defence is that there was consensual intercourse.

23. In **S v Gentle**[5] the court 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 dispute."*

[5] 2005 (1) SACR 420 (SCA) at 431 para 18.

24. It is my considered view that the version of the complainant is corroborated by B.K; in all material respect. Consequently there was no consensual sexual intercourse between the Appellant and the complainant. The trial court correctly accepted the version of the complainant as reliable.

25. The version of the Appellant is on the other hand that when the complainant stated that: if "*the two of you should not do anything silly (sexual intercourse). If you do such I will jump onto that bed and you will do the very same thing to me as you will be doing to B.K" (sic)*, she was interested in the sexual intercourse between the Appellant and B.K. hence she invited the Appellant to the floor.

26. Conversely, the record does not show that the complainant climbed the bed to have sexual intercourse with the Appellant. On the contrary, the proved facts are that she refused to sleep with the Appellant and B.K. on the same bed. Likewise, B.K. did not accept the proposal that she shares the bed with her friend and the Appellant. As the court found in **S v Chabalala**[6] that:

> "*The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses,*

[6] 2003 (1) SACR 134 (SCA) at 139 para 15.

probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

27. The complainant only woke up to see the Appellant on top of her having sexual intercourse with her. She immediately asked the Appellant as to what he was doing. The Appellant left her and dressed himself; but he does not say it is you who invited me I am finishing what you started. The probability in this case weighs in favour of the State.

28. I find that the Appellant's version cannot be reasonably and probably true. He was correctly convicted as charged.

THE SENTENCE IMPOSED AND FACTORS THAT WERE TAKEN INTO ACCOUNT

29. The Appellant is a first time offender as the State did not prove any previous convictions.

30. The personal circumstances that were placed before the trial court were that the Appellant was:

    30.1. 30 years old;

    30.2. Not married;

30.3. Has one child who is 7 years old;

30.4. The child is residing with her grandmother;

30.5. He is employed at Livilla Construction earning R200,00 per fortnight.

30.6. He is staying with his parents who are 73 and 71 years old respectively. His parents are not in good health.

30.7. He has a brother who is 25 years old.

30.8. He has completed Grade 12.

30.9. It was stated by the Appellant's attorney that the complainant rendered herself vulnerable to the convicted person by going to the Appellant's house.

31. The State read into the record the report on victim impact statement relating to the complainant which in part stated that:

31.1. She was deeply hurt as she was raped before when she was 13 years old. She was traumatized as a result of which she no longer has trust in men.

31.2. She is not free to have sexual intercourse with her partner due to the prior incident of rape.

31.3. She was once suicidal because of that rape.

31.4. The person who raped her is the boyfriend of the complainant's friend.

31.5. She finds it difficult to forget the prior rape incident.

32. The provisions of Section 51 (2) (b) of the Minimum Sentence Act find application unless there are substantial and compelling circumstances to deviate from the prescribed minimum sentence as well as the following factors:

32.1. The motive to commit the offence.

32.2. Prospects of reformation and correction.

32.3. Whether the Appellant was remorseful or not.

33. The trial court considered the following as aggravating factors:

a. Rape is a serious offence;
b. The right to dignity;
c. The fact that the Appellant did not use condoms at the time of the commission of the offence;
d. The fact that there was no physical injury does not count in favour of the Appellant;
e. This offence brought back her unpleasant memories of the previous incident of rape;
f. There are no substantial and compelling circumstances to deviate from the prescribed minimum sentence.

34. As was said by Scott JA (as he then was) in **S v Kgosimore**[7] held that:

> *"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence."*

35. The Appellant's legal representative did not make any submissions with regard to what constitute substantial and compelling circumstances during mitigation of sentence; neither is there any such submission in the heads of arguments. In contrast the State argues that the court this compelled to impose the prescribed sentence. The record does not even reflect that there are substantial and compelling circumstances in this case.

36. In **S v Roslee**[8] the court stated that:

> "*Although there is no onus on an accused to prove the presence*

[7] 1999 (2) SACR 238 (SCA) at 241 para 10.
[8] 2006 (1) SACR 537 (SCA) at 545 para 33.

of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration. In a given case it may not be enough for an accused to argue that such circumstances should be inferred from or found in the evidence adduced by the State."

37. Parenthetically, the Appellant's legal representative claimed that the complainant made herself vulnerable by sleeping at his room. This argument is untenable; it lacks a sense of respect to the complainant as a woman. Even sex-workers must be treated with dignity and respect. **In S v Jordan and Others (Sex Workers Education and Advocacy Task Force And Others as Amici Curiae**)[9], in their minority judgment, O'Regan and Sachs J (a point not contradicted in the majority judgment) observe that:

"*…Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute*."

38. As stated in **S v Vilakazi**[10] that**:**

"Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and

[9] 2002 (6) SA 642 (CC) at 670 para 74.
[10] 2012 (6) SA 353 (SCA) at 356-357 paras 1 - 2

strikes at the core of her personhood and dignity. Yet women in this country are still far from having that peace of mind. According to a study on the epidemiology of rape 'the evidence points to the conclusion that women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all human rights in South Africa."

CONCLUSION

[49]. Having considered all the relevant circumstances of this case, it is my considered view that this court should not interfere with the sentence imposed by the trial court.

ORDER

[50] Therefore I make the following order:

"The appeal against both conviction and sentence is dismissed."

M.P CHIDI

ACTING JUDGE OF THE HIGH COURT

I agree.

AML PHATUDI
JUDGE OF THE HIGH COURT