IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No: A 511/2013

In the matter between:

MTSHINI GUBUZA **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED ON 4 MARCH 2014

BOQWANA J

Introduction

[1] The appellant was arraigned before the Wynberg Regional Court for the following charges:

1.1 Rape of A D (‘first complainant’) – Counts 1 and 2;

1.2 Rape of N T (‘second complainant’) – Counts 3 and 4

1.3 Robbery with aggravating circumstances – Counts 5, 6 and 7.

[2] He was legally represented and pleaded not guilty to all the charges. On 28 February 2013 he was convicted of counts 1, 5, 6 and 7 with counts 1 and 2 combined as count 1 and acquitted of counts 3 and 4.

[3] On 24 April 2013 he was sentenced to 15 years imprisonment in respect of count 1 and 15 years imprisonment for counts 5, 6 and 7. The magistrate ordered 12 years of the sentence imposed on count 5 to run concurrently with count 1 and sentences for counts 6 and 7 to run concurrently with the sentence on count 1. The appellant was therefore sentenced to an effective period of 18 years imprisonment. The appellant appeals against both his conviction and sentence with the leave of the Regional Court.

Background Facts

[4] Charges levelled against the appellant emanate from an incident which occurred on 03 October 2011 at approximately 2:00 to 3:00 am , at Samora Machel involving two young girls, a 15 year old first complainant, a 22 year old second complainant and their 20 year old male friend, Y T (‘third complainant’). The three were walking together from a shebeen in Samora Machel. They testified that they had consumed alcohol but were not drunk. As they were in the vicinity of Spar they saw a group of four men approaching them. According to the first and second complainants, three of these men had scarves covering their faces, such that they could not be identified whilst the fourth man, whom they identified as the appellant, had no scarf on. The third complainant did not notice if all four men had scarves on, as he was frightened and only focused on the one who came to him. That one according to him had a scarf on.

[5] It is common cause that the complainants were threatened with knives and a screwdriver. The first and second complainants testified that the appellant threatened them with a screw driver whilst others threatened them with knives. The appellant however places his identity in dispute. One of the unidentified men took the first complainant's cap whilst the other two robbed the second and third complainants of their cell phones and also took R10 cash which belonged to the second complainant. The appellant took nothing and there was no communication between the men whilst this occurred. The men then chased the third complainant away and walked the first and the second complainants to a nearby vegetable or fruit stall.

[6] According to the first and second complainants the appellant took the first complainant to one side of the stall and two other men took the second complainant inside the stall. The appellant raped the first complainant by inserting his penis twice in her vagina.

[7] Inside the stall the second complainant was raped by two of the men who had scarves on their faces, one after the other. After the ordeal the two young complainants went to the police to report the incident. They also went to the hospital for medical examination. Dr Ntoi, who examined the first complainant, testified that there was evidence of penetration, being redness, tenderness and weakened skin in the first complainant's posterior fourchette and a white discharge which was consistent with her version that she was raped. Dr Bagasa, who examined the second complainant, also noticed a white discharge from the second complainant's genitalia which could be possibly semen. No further injuries were noted in the second complainant's vagina but penetration could not be excluded. Swelling and redness was however noticed in the anal area of the second complainant which was compatible with forceful penetration (although the second complainant did not allege anal rape). Both doctors took swabs from the

complainants' bodies for DNA testing. It is not clear what happened to those swabs as no DNA evidence was presented before the trial court.

[8] The appellant denied that he raped the first complainant and was involved in their robbery. He raised an *alibi* stating that on the day in question he was sleeping at his home having been there since 8 o'clock in the evening and never left. He testified that he knew the complainants and had in fact seen them drunk at the shop earlier in the day.

[9] The magistrate found the appellant guilty of the rape of the first complainant. Applying the principles of complicity and liability the magistrate found that there was no action on the part of the appellant in respect of the second complainant's rape. She however found him guilty of robbery with aggravating circumstances on the basis of common purpose. The magistrate found that no substantial and compelling circumstances existed warranting deviation from the minimum sentence prescribed. She further found that the state had neglected to prove the first complainant's age and therefore the minimum sentence applicable in respect of the rape count would be 10 years imprisonment. The magistrate however found that in this case there were circumstances calling for a sentence in excess of 10 years: which were that the complainant was young, she suffered injuries in her genitalia and the rape had a serious psychological and emotional impact on her.

[10] Central to the appellant's grounds for appeal is the issue of his identity as the perpetrator of these crimes. It was submitted by the appellant's counsel that the magistrate misdirected herself by accepting the state witnesses' evidence as reliable with regard to the identity of the appellant without taking into account material contradictions in their evidence. Secondly there was no evidence that the appellant actively participated in the robbery and should not have been convicted on the basis of common purpose. Thirdly,

the sentence imposed by the magistrate was shockingly inappropriate, particularly in relation to the rape count. It was submitted that there was no justification to impose a sentence in excess of the minimum prescribed in these circumstances.

Evaluation

Identification

[11] It is trite that evidence of identification should be treated with caution. In **S v Mthethwa 1972(3) SA 766 (A) at 768A** the Court said the following:

> 'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: The reliability of his observation must also be tested. This depends on various factors, such as the lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities..'

[12] In the present matter the appellant was identified by the first and second complainants as one of the four men that stopped them. Both complainants testified that they knew the appellant before the incident from seeing him around Samora Machel. The first complainant testified that she had known the appellant for about two to three years prior to the incident. The appellant had often asked for money from her and she knew him by the name 'Ching'.

[13] On the day in question she recognised the appellant because his face was not covered with a scarf. She testified that whilst it was dark, it was not very dark that one could not see. According to her there were no lights on the street but only poles with no globes. She testified that she looked at the appellant whilst they were walking to the stall and at the stall she had eye contact with him, whilst he was on top of her, and noticed that she knew him from somewhere and was sure that it was the appellant. When asked why she looked at him again, she testified that she wanted to make sure that she was not mistaken as to the identity of her perpetrator.

[14] The record reveals that the first complainant did not provide sufficient information on the manner in which she was able to identify the appellant in the absence of street lights and was not properly examined on this aspect. These crucial details are however better explained by the second complainant who testified that there were street lights on the road next to the stall. She also testified that she also knew the appellant prior to the incident and that, unlike his co-perpetrators, his face was not covered with a scarf and she could also recognise him because he had spots on his face. She also testified that the appellant held the first complainant and walked with her to the other side of the fruit stall and she also saw the appellant and the first complaint, the former holding the latter's hand, together emerging again after her own rape ordeal.

[15] In light of the explanation given by the second complainant, I am satisfied that there was sufficient light provided by the street lights situated on the road next to where the complainants were robbed and next to the stall where the first complainant was raped otherwise how would they have been able to see that they were attacked by four men three of whom had scarves on, threatened with knives and taken to the vegetable or fruit stall. It is also

important to note that the appellant and the first complainant did not go inside the stall. They were outside the stall during the rape.

[16] It appears from the evidence that the incident took place over an extended period of time, from Spar to the vegetable stall (although the first complainant could not provide the exact amount of time the ordeal took). If that is so, she would have a fair amount of time to observe the identity of the perpetrator. The first complainant also testified that she recognised the appellant's voice when he threatened to kill her mother if she reported the incident. The first complainant's evidence was supported by the second complainant in material respects. The magistrate in my view carefully considered evidence in relation to the identity of the appellant and there is no reason to interfere with her decision on count 1.

[17] As already mentioned rape is not in dispute. The first complainant's evidence on how the rape occurred is very clear and her version that she was raped was supported by medical evidence. It is worth pointing out an issue that is seriously concerning in this matter and that is the absence of DNA evidence in relation to both the first and second complainants. Medical examination of both complainants indicated the presence of possible semen on their genitalia. Swabs were taken by the doctors in respect of both of them. Despite this, DNA evidence was not presented to the trial court. DNA evidence could prove to be crucial evidence in resolving issues of identity in this case, especially in respect of the identities of the attackers of the second complainant, who were unidentifiable due to the scarves they wore. It cannot be in the interest of justice that the state omitted to present such relevant evidence, if it was available. If that evidence was not available, then the court should have been apprised as such and the reasons for such unavailability tendered. It is

not clear what happened to the swabs that were taken by the doctors in this case.

Robbery and common purpose

[18] I now turn to the charges of robbery with aggravating circumstances. The requirements of common purpose were outlined in the decision of **S v Mgedezi 1989 (1) SA 687 (A) at 705I-706B** as follows:

> 'In the absence of proof of a prior agreement, accused No. 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12 can be held liable for those events, on the basis of the decision in **S.v. Safatsa** and **Others 1988 (1) SA 868 (A)** only if certain prerequisites are satisfied.In the first place, hemust have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[19] It is now established that the mere presence of a person at a crime does not by itself constitute aiding or abetting.Apart from being one of the four men who approached the complainants as a group and threatening the complainants with a screw driver there was no other action on the part of the appellant observed by the complainants. It is common cause that the complainants' items were seized by the three unidentified men. The appellant took nothing. Both complainants testified that there was no communication between the men as they were being robbed and as they walked to the vegetable stall. It appears from the evidence that the appellant said nothing to encourage his colleagues nor associate himself with their

actions of robbery. The mere fact that he held a screwdriver did not necessarily mean that he knew about or reconciled himself with the robbery. He could have used the screwdriver to threaten his victims for the purposes of perpetuating the rape.The appellant's knowledge of the robbery or his reconciling with itwas not the only reasonable inference to be drawn from the fact the appellant was part of the group of armed men.

[20] Overturning the decision of the trial Court in the matter of **Toya-Lee van Wyk v The State (575/11) [2012] ZASCA 47 (28 March 2013),** the Supreme Court of Appeal said the following at paragraph 16:

'While the inference of such an association can sometimes be drawn from what occurred or was said during or after the event, care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person who is sought to be held criminally liable for the actions of some of the others in the group.'

[21] The magistrate erred in my view by concluding that the appellant associated himself with the actions of the others without specifying which actions of the appellant led her to that conclusion. In light of the above, the State failed to discharge the onus of proving the guilt of the appellant beyond reasonable doubt in respect of counts 5, 6 and 7. The appellant is therefore entitled to acquittal in respect of those counts.

Sentence

[22] Turning to sentence in respect of count 1. It is trite that sentencing lies within the discretion of the trial court. The appeal court may interfere with the sentence imposed when the trial court has materially misdirected itself or where the sentence imposed is shockingly inappropriate or where discretion has been improperly or unreasonably exercised. See **S v Malgas 2001 (2) SA 1222 (SCA**) at paragraph 12

[23] Section 51 (3) of the Criminal Law Amendment Act 105 of 1997provides for the imposition of a lesser sentence where substantial and compelling circumstances militate against the imposition of the ordained sentence. On the other hand, the *proviso* to s 51 (2) permits the imposition of a sentence in excess of that prescribed provided that the increased sentence does not exceed the prescribed sentence by more than 5 years.

[24] In the decision of **Director of Public Prosecutions (Transvaal) v Venter 2009 (1) SACR 165 (SCA) Mlambo JA** (as he then was) said the following:

'[19] It needs to be borne in mind that the sentences provided for in the Act are minimum sentences for the prescribed offences and *Malgas* was directed to whether a lower sentence might be called for in a particular case. But an evaluation of the cumulative effect of all the circumstances, in accordance with the approach in that case, might well indicate that a higher sentence is called for. I think that is applicable in this case. For had there not been the strong mitigating circumstances that I will presently come to, I think a court might well have been justified in imposing a sentence far in excess of the minimum. It is only by applying those mitigating circumstances that I have come to the conclusion that a proper sentence would be something less.'

[25] The trial court in this case found that the state had neglected to prove the age of the complainant and therefore although the complainant was said to be 15 years of age at the time the offence was committed, the minimum sentence of life imprisonment could not be imposed, and 10 years would be then the applicable minimum sentence prescribed in the circumstances. Having said that the court went on to find that because the first complainant was still young, defenceless, suffered injuries to her genitalia and was severely traumatised, a sentence in excess of the 10 years prescribed was justified.

[26] The appellant was 22 years old when he committed the offence. He is the first offender in relation to the rape charge. He however has a previous conviction for robbery committed in 2007, for which he was sentenced to 12 months imprisonment 6 months of which were suspended. That is a violent crime which cannot be ignored by the Court for the purposes of considering the appropriateness of sentence. The courts have tended to impose sentence exceeding the minimum in cases where aggravating factors called for an increased sentence. In this regard see **S v Mthembu 2012 (1) SACR 517 (SCA) at paragraph 20; DPP (Transvaal) v Venter supra.**

[27] The factors considered by the magistrate coupled with the appellant's previous conviction of robbery cumulatively justify a sentence in excess of the prescribed minimum. In this regard, there is no misdirection on the part of the magistrate and no basis to interfere with the sentence that she imposed.

[28] In the result, I propose an order in the following terms:

1. The appeal on count 1, Rape, is dismissed and the conviction and sentence are hereby confirmed.

2. The appeal in respect of counts 5, 6 and 7 is upheld and the convictions and sentences are set aside.

3. The magistrate's orders are substituted with the following:

   '(a) the accused is guilty on charge 1;

   (b) the accused is acquitted on charges 5, 6 and 7;

   (c) the accused is sentenced to 15 years imprisonment in respect of charge 1 antedated to 24 April 2013.'

N P BOQWANA
Judge of the High Court

I agree, and it is so ordered

T NDITA
Judge of the High Court