IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A51/2019

In the matter between:

H L **Appellant**

And

The State **Respondent**

JUDGMENT DELIVERED ON 26 APRIL 2019

BAARTMAN, J

[1] This is an appeal against the convictions on 2 counts of assault with intent to do grievous bodily harm (**counts 1 and 2**) and two counts of rape (**counts 3 and 4**), as well as the sentence of 26 years' imprisonment imposed by the regional magistrate at Parow.

[2] The main grounds of appeal, which I deal with below, are:

'1. The learned magistrate failed to consider the appellant's explanation that he and the complainant had consensual sex.

2. The court a quo incorrectly convicted the appellant on two counts of rape and two counts of assault with intent to do grievous bodily harm.

3. The court a quo misdirected [itself] not to consider …the sentences to run concurrently.'

[3] The court *a quo* accepted that the appellant and the complainant had been married for 27 years at the time of the incident. The couple had been estranged for 3 months prior to 17 December 2016 when the incident that forms the subject of this judgment occurred. The court further accepted that the appellant had assaulted the complainant prior to their separation; however, he initiated reconciliation on 17 December 2016 when he sent their two daughters with a letter to the complainant in which he begged her to return – she did.

[4] On the same day, the appellant assaulted her. The court accepted the medical evidence of Dr Islam that the complainant sustained the following injuries:

'The [complainant] was badly assaulted on her head and different parts of her body. The assault was prominent and of a serious nature. Bruises on the neck, tenderness on the chest, skin and head was hanging, clearly [the complainant] had been scalped. The bone on the scalp could be seen. The wound was [approximately] 5 centimetres deep and wide. …The [complainant] was lucky to be alive. The nature of the wound and the depth of the injury could have led to instant death.'

[5] The state proffered a count of assault with intent to do grievous bodily harm (count 1) and a count of attempted murder (count 2) pursuant to the injuries sustained. The court, in respect of count 2, accepted that the appellant had wanted to cut off the complainant's

hair and not to kill her. Therefore, in respect of count 2, he was convicted of assault with intent to do grievous bodily harm. In the circumstances of this matter, the criticism against that finding is incomprehensible. The assault that caused the bruises on the neck and tenderness on the chest (count 1) was inflicted with the fist to punish the complainant because she had gone to a friend to borrow some cigarettes. Thereafter, the appellant ordered the children out of the house, made the complainant sit on the bed and started cutting off her hair until blood burst out of her scalp.

[6] It was common cause that the complainant had had an extra marital affair and had been staying with her lover's sister while she was away from home. The appellant was left to care for their 6 children in her absence. The cutting off of her hair and scalping (**count 2**) appear to have been done in a jealous rage. He remarked that the complainant was a beautiful woman before cutting off her hair and used insulting language towards her. I cannot fault the trial court's finding that 2 offences were committed.

[7] The trial court accepted that after the appellant had cut off the complainant's hair, he instructed her to undress. She was tardy in compliance, therefore, he assisted by cutting her clothes off her body with a knife. In particular, he cut off her bra and panties. At that stage, one of their children, J, entered the room and asked the appellant why the complainant was bleeding. The appellant got rid of J and promised not to hurt the complainant further and threw the knife across the bed. Thereafter, the appellant had sex with the complainant by penetrating her mouth and vagina. It is in issue whether the trial court erred in concluding that the intercourse was non-consensual and that 2 counts of rape had been committed.

[8] The trial court was cautious in its approach to the complainant's evidence as she was a single witness. The complainant admitted that she smoked 'tik' on the day but said that she had only inhaled the

drug once before she was interrupted and had not continued. There is no indication that she was under the influence of the drug thereafter. The trial court found that the complainant's evidence was satisfactory in all material respects[1]. The record bears out the correctness of that finding. The chronology of the events supports the finding that the sex was non-consensual.

[9] However, the situation is complicated by the history of abuse in this marriage. The complainant conceded there had been occasions when they would make up with sex after a fight. However, she said that the appellant had never assaulted her to this extent. '…hy het nog nooit vantevore vir my so seer gemaak nie.' Nevertheless, she was prepared to concede that the appellant might have accepted that she was a willing sexual partner. However, the fact that the complainant was used to sex sometimes following an assault does not mean that she consented to the sexual intercourse. She said that she was too scared to refuse the oral sex because she saw the rage in the appellant's eyes.

'Ek het dit gedoen ja want ek was bang om te weier because ek kon sien die woede in sy oë in. Ek kon sien hoe kwaad is hy.'

[10] The appellant confirmed that he had been upset – angry – when he hit the complainant. He further said that the complainant had tried to run away from him before they had sexual intercourse and that he could see how 'totally scared' she was. He then instructed her to undress because he knew she would be unable to escape if naked. The appellant further said that he only saw the blood on the complainant's head after they had consensual sex. It follows that he confirms that he cut off her hair and scalped her before having sex. In those circumstances, the trial court found:

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[1] Section 208 of the Criminal Procedure Act, 51 of 1977.

'Die omstandighede van die seksuele omgang is van so 'n aard dat geen mens sal instem om seksuele omgang te hê in daardie omstandighede nie. Dit is ook onmoontlik dat beskuldigde nie die bloed gesien het wat van die klaagster se kop geloop het op daardie stadium nie…'

[11] I cannot fault that finding; its correctness is borne out by the medical evidence. In the circumstances of this matter, the complainant was coerced through a violent assault to submit to sexual intercourse[2]. It follows that the court's finding that the appellant raped the complainant is unassailable. In convicting the appellant on two counts of rape, the court relied on the definition of rape[3], which provides:

'Sexual penetration includes any act which causes penetration to any extent whatsoever by –

(a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person,

and "sexually penetrates" has a corresponding meaning;'

[12] Each act complained of, oral and vaginal penetration, constitutes sexual penetration. The acts occurred reasonably close in time to each other. In Willemse[4], the court found an accused who had penetrated the complainant vaginally and had then 'proceeded to

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[2] *S v GO* 2017 JDR 1582 (SCA) at paras 16–19.
[3] The (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.
[4] *S v Willemse* 2011 (2) SACR 531 (ECG).

have anal intercourse with her' committed 2 counts of rape. The court reasoned that the separate penetration acts involved 'a distinct thought process' in which the accused decided to rape the complainant in a different manner from the first act of penetration and was 'a strong indication that [it] was a separate form of rape'.

[13] Similarly, in *S v Uithaler*[5], the court found that the accused had committed two offences: rape and indecent assault. The offences were committed, on 1 April 2007 before the Sexual offences Act came into operation in terms whereof anal penetration was defined as rape, in the following circumstances:

'[3] …On the day in question the appellant and his co-accused approached the complainant while relaxing with her male companion at the back of a bakkie which was parked in an industrial area in George. The appellant forced the complainant to accompany him into nearby bushes where he proceeded to rape her vaginally. Thereafter he instructed the complainant to turn around and lie on her stomach and penetrated her anally…'

[14] I am persuaded that the trial court correctly concluded that the appellant committed two counts of rape. The definition of sexual penetration leaves no doubt that two separate acts were committed in the circumstances of the matter. The case law referred to above supports that finding.

Sentence

[15] The trial court took the two counts of assault with intent to do grievous bodily harm together and sentenced the appellant to 8 years' imprisonment. Similarly, the court took the two counts of rape together and imposed 18 years' imprisonment. As indicated above,

[5] [2014] JOL 31517 (WCC).

the appellant submitted that the trial court erred in not letting the sentences run concurrently. The submission has no merit.

[16] The trial court has discretion when imposing sentence and a court of appeal has limited grounds to interfere with the exercise of that discretion. I have carefully considered the court's judgment on sentence and could find no misdirection in the exercise of its discretion.

[17] However, if the sentence imposed invokes a sense of shock, this court can interfere. The appellant's personal circumstances appear from the record, I do not repeat them. The details of the offence, dealt with above, leave no doubt that the offences are serious. The community interest is apparent and the court dealt with it correctly. In the circumstances of this matter, the sentence of 26 years' imprisonment does not invoke a sense of shock and is not inappropriate.

[18] I, for the reasons stated above, make the following order with which Wille J concurred.

(i) The appeal against conviction and sentence is dismissed.

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BAARTMAN J

I concur.

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