IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No: **A154/20**

In the matter between:

RAGHIED DAVIDS Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 07 OCTOBER 2020

KUSEVITSKY, J

[1] The Appellant was arraigned in the Paarl Regional Court Paarl on two counts of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"), read with the provisions of sections 51 and 52 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[2] The 55-year old Appellant, who was legally represented at all material times, was convicted on 12 December 2018 on both counts and sentenced to ten years' imprisonment on each count, the court having exercised its discretion in departing from the minimum sentence of life imprisonment. The effective sentence was thus 20 years imprisonment.

[3] The Appellant applied for leave to appeal on 24 December 2018, however that application was only heard on 29 July 2019, the delay having emanated as a result of an incomplete record. The court a *quo* granted the Appellant leave to appeal in respect of his conviction only and the record was reconstructed during March 2020 as a result of missing evidence that had not been mechanically recorded. The fully reconstructed record was however available at the hearing of this appeal and the parties confirmed that the record was in order and that it was sufficient for us to proceed with the appeal.

[4] The appeal was enrolled to be heard on 21 August 2020 and the parties duly filed their heads of argument. It became evident in these heads, that the Appellant on the one hand, contended that there had effectively been a duplication of charges and that in the event of the court dismissing the appeal, that the Appellant should only be convicted on a single charge of rape. The State on the other hand contended that the court a *quo* correctly convicted the Appellant on two separate counts of rape, and in the alternative, should this court uphold the point raised by the

Appellant on appeal in respect of the duplication of charges, that an appropriate sentence would be one of 15 years' imprisonment because of the aggravated rape. In light of these submissions, this court directed a letter to the parties, inviting them to make additional submissions in the event of this court upholding the Appellant's contention that the court a *quo* had misdirected itself in fact and in law that there had been a duplication of charges – that this court was entitled to consider whether an increased sentence would be appropriate in the circumstances. The court is indebted to both counsel for the additional submissions made with regard to this aspect.

[5] The facts of the case are relatively straight forward. On August 2020, the complainant was at a shebeen where she consumed alcohol. Appellant was also at the same shebeen that evening. At some point during the evening, she had to use the restroom. It was occupied and she decided to relieve herself in between houses in a nearby dark alley. Coincidently the Appellant also happened to be in the vicinity of the passage way. He saw her whilst she was urinating and and hurriedly approached her. A sudden blow to the head of the complainant with an unknown object started the violent events that ensued. She wrestled with her assailant and called out for help, but was soon overcome when he choked her which left her unconscious. Stiaan Sass and Jacques Arendse, residents in a nearby house heard the commotion and upon investigation, discovered the complainant in their back yard close to the passageway. Jacques Arendse needed a torch to enhance the lighting in the alley.

[6] The following morning, the complainant woke up at her home, unaware as to what had happened to her. She was told by people what had transpired. She went to the hospital as her lower body was in pain and she also noticed blood on her

underwear and on her top, even though she was not menstruating. On 27 August 2017 the complainant was medically examined by Dr Gafoor. She sustained injuries to her left forehead, lower back, her right thigh and left side of her upper body. The complainant's genital injuries were consistent with anal and vaginal penetration.

[7] The Appellant is known in the area by the nickname "Knapie." The Appellant is known to the complainant as well as the witnesses, Stiaan Sass and Jacques Arendse. The State adduced the evidence of the complainant, S[…] P[…], Stiaan Sass, Jacques Arendse and Dr Gafoor.

[8] Dr Rushaan Gafoor completed the J88 report. According to his report, the complainant reported to him that on the 26 August 2017 at approximately 20h00, she had consensual sex with one partner and no condom was used. Upon his examination of the complainant, he found two tears in the midline left of the posterior fourchette. He stated that it was highly unlikely that these tears could have resulted from consensual sex.

[9] He also found multiple tears on the perineum right and left extending into the anus. He explained that these were superficial tears on the outer layer of the skin and epidermis; unlike the ones present during child birth - but that this tear was on the perineum and it extended right into the anal orifice. He explained that the extension of the tear was usually associated with blunt force to the perineum and the anus, which was most likely an indication of anal penetration. He stated that this usually happened with forceful penetration and trying to locate the vaginal orifice with the pushing of an erect penis against the perineum. He stated that even though if there is no anal penetration, one would still get perineal tears. From his examination,

he found anal penetration as well because there were tears in the anal orifice, so there was penetration in that area as well.

[10] He also noted a bruise on the knee and three abrasions. He stated that the bruise on the knee could occur with someone forcing someone's legs open and pushing it up. She also had a bruise on her back, which would occur from blunt force trauma. During cross examination, he confirmed abrasions on her forehead which was consistent with blunt force trauma. He confirmed that a panga could cause such an injury. He reiterated that it was unlikely that with consensual sex, that one would suffer these types of injuries, referring to the two tears on the middle left side of the vagina. He stated that this was forceful, painful sex.

[11] The Appellant denied that he had raped the complainant. He admitted that he was at the shebeen that night but stated that he had left early. However, the evidence of Miss Stiaan Sias and her boyfriend Jacques Arendse, contradicts the Appellant's version.

[12] Sias was with her boyfriend and her children in her home. They were watching a late night movie. She heard a scream in her backyard and asked her boyfriend, Jacques Arendse, to investigate. He took a torch and she followed. When they got outside and shone the torch, they saw the Appellant, laying on top of the complainant. When he saw them, he picked up his *panga* and ran away. On closer inspection they found the complainant laying on the ground. She was unconscious. Her pants and underwear were undone and she was covered in blood in the lower part of her body. Sias called Jurgen and Anesto to assist her to take the complainant

home as she was unable to stand. She confirmed that it was the Appellant as she has known him since her childhood and he lives in the same street as her.

[13] During cross-examination, much was made about the time discrepancy as to when the incident would have occurred. According to Sias, the incident occurred at around 2am in the morning and according to the complainant, she estimated the time to be around midnight. However, she could not be sure of the time. Given the fact that she could not remember the events after she was choked and subsequently passed out, I am of the view that nothing turns on this. Sias also identified the Appellant's clothing. She stated that he was dressed in a jacket, a white three quarter pants, a white '*hopper'* and a white cap. He also wore takkies but she could not remember the colour. The Appellant however stated that he wore a red t-shirt, black jeans, white takkies and white cap. This was also in contrast to her boyfriend's statement where it was stated that the Appellant was wearing a red leather jacket, blue jeans and black '*floppie'*. She conceded that she could not exactly remember as the incident had happened a long time ago. She reiterated that she saw the Appellant and it was the screaming that had made her leave her house to investigate.

[14] A further indication that she had known that it was the Appellant was the fact that she testified that the Appellant picked up his *dagga* pill that he regularly smokes. She said that he smoked a different type of dagga to what the people on the yard usually smokes. When challenged that she would not have known what type of *dagga* the Appellant smoked, she answered that she did, given a time when the Appellant had dated her friend Vanessa and Appellant would send her to buy his *dagga*. Conveniently, he denied smoking *dagga* that day.

[15] Jacques Arendse confirmed the evidence of his girlfriend Siaan Sias. He testified that whilst he was busy making himself coffee and watching TV, he heard a bang against the gate and then the dogs started barking. He was with Sias and her friend, Elizabeth. He told his girlfriend that he was going to check what was going on outside. He stated that it was very dark and it was difficult to see. He went back to fetch a torch. When he returned, he saw the Appellant and the complainant, S[…].

[16] He asked the Appellant what he was doing. He saw the Appellant laying on top the complainant. The Appellant then got up, pulled up his pants and ran away. He and Sias found S[…] laying on the ground. His girlfriend helped her dress. She then called the complainant's boyfriend to take her home. He confirmed that the Appellant had a long brown object that looked like a *kierie*. When he stood up and pulled up his pants, he picked up the *kierie* and took it with him.

[17] He further testified that the Appellant is known to him as they live in the same street. They would often greet each other when they passed. He had seen the Appellant earlier that evening drinking beer at the shebeen. He also confirmed that the complainant was 'unconscious' when they first saw her. She regained consciousness when they were busy taking her to the front of the property and whilst going through the passage, she wanted to know where she was.

[18] During cross-examination he reiterated that it was around 2am that the incident had occurred and not 12pm as the complainant had testified. When it was put to him that what he had seen, could have been two consenting individuals having sexual intercourse, given that he did not see any fighting or screaming. He however replied that the complainant was unconscious. He also stated that if it was

consensual, the Appellant would not have run away immediately after having been recognised.

[19] The Appellant's evidence was that of denial. He confirmed that he was at Ashley's shebeen. He denied knowing the complainant and claimed that he never saw her. He testified that he wanted to urinate and Ashley told him that he could not go inside but directed him around the corner. When he went around the corner, he saw Jurgen and someone called 'Papbek'. They were consuming drugs. He returned to the shebeen and thereafter went home at around 10pm. He stated that he knows Jacques Arendse and Siaan Sias, saying that they usually borrow money from him. During cross-examination he found it very difficult to concede that went to urinate in a passage close to where the complainant was, explaining that there were numerous passages next to each flat. He also stated that it was not that dark, but that he did see two boys standing in the street. Presumably, this was mentioned as an attempt to pin the blame on them.

[20] In her judgment, the court established that both the Appellant and the complainant was present at the tavern on the evening in question. The complainant went to relieve herself and the Appellant was in the same vicinity. The complainant identified the Appellant as the person whom she said was watching here and who attacked her. Her identification is corroborated by the evidence of Sias and Arendse who testified that they saw the Appellant on top of the unconscious complainant. The court accepted the evidence of the two witnesses whom she found to be credible. The court also rejected the evidence of the Appellant, having come to the conclusion that he was evasive and untruthful in his endeavour to not place himself in the passage way where the incident occurred. Given the totality of the evidence

presented, I can find no misdirection in the conviction of the Appellant's rape of the complainant.

[21] I am however of the view that the court a *quo* misdirected itself when it convicted the Appellant of two counts of rape. In the matter of *Peter Mario Minaar v The State*[1], the court dealt with the relevant authorities on this aspect in considering whether consecutive acts of non-consensual vaginal and anal penetration constituted one or two offences. The court came to the following conclusion:

> "[20] After all, a man who repeatedly penetrates a woman vaginally during one event of *coitus* is not generally charged with rape in respect of each individual act of penetration unless there is an appreciable time interval or an *actus interveniens* such as ejaculation. In circumstances such as the present, where there is little interruption between the penetration of the vagina twice, an attempt to penetrate anally and a single act of ejaculation right at the end of the encounter, I consider that only one criminal contravention has been established. See S v Blaauw 1999 (2) SA 295 (W) at 300 *c-d* where Borchers J suggested the following approach:
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> > *"Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."*
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> The *dictum* in Blaauw was cited with approval by the Supreme Court of Appeal in S v Tladi 2013 (2) SACR 287 (SCA) at [12]. See also S v BM 2014 (2) SACR 23 (SCA) at [6] and S v Maxabaniso 2015 (2) SACR 553 (ECP)."

[22] There is no evidence to indicate that an *actus interventus* occurred which would bring it within the realm of two separate acts of rape. Dr Gaffoor furthermore testified that there may be instances in which male perpetrators, in their haste and attempt to find the vaginal orifice, mistakenly enter the anus. This, together with the

[1] Case No. A43/18 WCHC Dated 28 March 2018

short timeframe in which the incident occurred, leads me to conclude that these acts of penetration followed swiftly one after the other, without an appreciable *coitus interruptus*, and should be taken as one single encounter. Thus the Appellant should only have been convicted of a single contravention of section 3 of SORMA.

[23] Turning to sentence, as I alluded to earlier, the parties were invited to make submissions to the court in respect of sentence in the event that it found that a single count of rape should have been preferred and that the court a *quo's* sentence of 10 years' imprisonment (on the single charge) should be revisited. The State was of the view that an appropriate sentence would be 15 years and counsel for the Appellant maintained that the sentence imposed by the court a *quo* should be confirmed.

[15] The prescribed minimum sentence for a single count of Rape or Compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part 1 are the following:

> "52 (2) Notwithstanding any other law but subject to subjections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-
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> (a) …
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> (b) Part III of Schedule 2, in the case of
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> (i) a first offender, to imprisonment for a period not less than 10 years;
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> (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offense, to imprisonment for a period not less than 20 years."

[24] It is common cause that the court a *quo* found substantial and compelling circumstances to deviate from the minimum sentence of life imprisonment. However, in terms of the one charge and conviction of rape, a minimum sentence of 10 years' imprisonment is applicable.

[25] It is trite that when a judgment on sentence is considered, it is a well balanced evaluation of all the factors, all of the facts and circumstances of the case.[2] The personal circumstances of the Appellant as reflected in the record, are as follows. The Appellant is 55 years old and unmarried. Before his arrest, he was in a long term common-law relationship for nine years. He has three children, the youngest of whom is 6 years old. He was employed as a painter and earned R300-00 per day. He contributed financially to the maintenance of the youngest child although since his incarceration, the Appellant's common law wife and child live with his aunt, and they have been in a position to sustain their livelihood without the assistance of the Appellant. He had also been awaiting trial for approximately one year and four months before he was sentenced.

[26] The State submitted that the personal circumstances of the Appellant did not establish substantial and compelling circumstances to justify a deviation from the minimum sentence. Instead, it argued that the circumstances were in fact aggravating to justify the imposition of a heavier sentence. The State argued that the rape of the complainant was indeed grievous. The complainant was 23 years old at

[2] S v Zinn 1969 (2) 537 (A) at 540 G

the time of the incident. The complainant and the Appellant were both out socialising with their respective friends. She was physically attacked with a weapon by the Appellant. She sustained an injury to her left forehead. Dr Gafoor described this injury as red with painful abrasions. She was also choked. She sustained injuries to her lower back with swelling, and abrasions and was red, her right knee and left flank were bruised. The gynaecologist examination revealed tears to the posterior fourchette, perineum and the anus. She managed to shout out, which alerted her neighbours.

[27] The State argued that the complainant was left by the Appellant in a state of humiliation with her private parts exposed. The Appellant arrogantly, aggressively and excessively violated the human dignity off the complainant. Apart from the vulnerability as a woman, the complainant was intoxicated and this made her a perfect prey for the Appellant's predatory conduct. The intense humiliating experience of having to live with the knowledge that one was raped by a familiar person, whilst unconscious cannot be emphasized, so it was argued.

[28] I agree with the State's sentiments. The Appellant saw the complainant and knew that she was inebriated. He then purposefully set out to take advantage of her condition for his own egregious pleasure. Women are entitled to engage in social activity with the confidence that they will not be savagely pounced on by other persons whose sole purpose is to denigrate and humiliate them for their own sadistic pleasure. What is worse in this instance, is the fact that the complainant was unconscious and had to find out about the rape by people within the community. The shame and humiliation of that revelation would most certainly have had an adverse impact on her psyche and emotional wellbeing. It is also apparent that the system

failed the complainant in that neither the State nor the court a *quo*, called for a victim impact assessment report to be undertaken. There is also no indication that the complainant received any form of assistance from social services for therapeutic intervention in the form of counselling. During the hearing of this matter, counsel for the State, Ms Botman gave an undertaking that she would ensure that the necessary arrangements would be made for the complainant in this regard, if she so required, given that this incident occurred more than three years ago. At the time of penning this judgment, all indications are that the necessary arrangements have now been made for the complainant. Although these measures should be available to victims of sexual assault at the police stations, I am of the view that prosecutors and presiding officers should ensure, when seized with these matters, to ensure that the necessary social support has in fact been provided to a victim/complainant.

[29] In *S v Chapman* 1977 930 SA 341 (A), the Court recognised that rape is a very serious offence, is humiliating, degrading and a brutal invasion of privacy, dignity to the person of the victim. Mohamed CJ said at 345A- B that:

> "The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the feat, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[30] In addition to *Chapman*, I would add that women have a legitimate expectation to go out and socialise with their friends and, if inebriated, that they have an expectation not to be interfered with and not to be taken advantage of. It would be naïve for this court to ignore the fact that it is a reality that people, including young

adults, socialise more than others. Just because someone is intoxicated, does not give anyone licence to abuse, nor is it a green light to take advantage of someone who may be in a vulnerable state. Just like men who may wish to socialise with friends, so too should women also have the freedom to do so, without fear, content in the knowledge that they will be safe; without the fear of being harassed, or assaulted, raped or murdered. Men, and I emphasize men, as they are generally the main perpetrators of these types of crimes in our country, need to know that vulnerable persons, and women and children in particular, should be protected and not harmed or abused.

[31] I am therefore of the view that cumulatively, given the vicious and violent manner in which the complainant was sexually violated, that the interest of the community and that of the complainant trumps the personal circumstance of the Appellant, and that this court would be justified in exceeding the minimum sentence provided. In any event, it is after all, no more than a minimum sentence, and a court at its discretion, and based on the facts at its disposal, is at liberty to impose a sentence that is not shockingly inappropriate or disproportionate to the crime. More so, the sanction must reflect the seriousness of the offence.

[32] In the circumstances, I am of the view that a sentence of 15 years is appropriate under the circumstances.

Accordingly, I would make the following order:

A. The appeal against the conviction and sentence on count 2 is upheld.

B. The conviction and sentence on count 2 is set aside.

C. The sentence in respect of count 1 is set aside and replaced with a sentence of 15 years' imprisonment.

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Kusevitsky, J

I agree and it is so ordered.

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Saldanha, J

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