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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA **(GAUTENG DIVISION, JOHANNESBURG)**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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CASE NO: A10/2016

In the matter between:

VUSI SWABULUKA

Appellant

and

THE STATE

Respondent

Summary

An appeal against life imprisonment imposed on the accused by the Roodepoort Regional Division of Gauteng in respect of two counts of rape read with section 51 and 52 of Schedule 2 of Act 105 of 1997, together with one count of assault with intent to do grievous bodily harm. The trial court imposing one term of life imprisonment in terms of count 1 and 2 and five (5) years imprisonment in respect of count 3. Evidence demonstrating that complainant was raped twice and the provisions of section 208 Act 51 of 1977 properly applied.

Order

- 1. The appeal against conviction and sentence is dismissed.**

JUDGMENT

COLLIS J (MOKOSE AJ concurring)

[1] On 31 August 2013 the complainant then aged sixteen years was at her home together with her mother and other siblings. At approximately 22h00 she received a phone call from her friend who requested her to meet her outside Booyens tavern. She proceeded to sneak out of her parental home and upon arrival at the tavern could not find her friend as per their arrangement. The appellant then approached her and offered her assistance to enter inside the tavern. She refused his help and he proceeded to walk away. She also decided to go back home. On her way home she met up with Senzo, a family friend, who decided to accompany her to her house and as they proceeded along the way they met up with the appellant. This was the appellant's second encounter with the appellant that same evening.

[2] The appellant then grabbed the complainant by her clothing pulling her away from Senzo, and proceeded to struck her on her face with a beer bottle which he had in his possession. He pulled her in the direction of an open veld which was nearby. Senzo decided to run for help and to report the matter to her mother. He, whilst still on his way to the complainant's house, decided to call her brother (*Mpendulo*) and reported to him that the complainant was pulled away by an unknown person.

[3] The brother then decided to call his sister and managed to speak to her on her cell phone where she reported that she was being dragged towards a veld by the appellant. The appellant then reprimanded her for having spoken to her brother and it was then that he had also threatened to kill her.

[4] Around a dumping site which was nearby, the appellant then instructed the complainant to undress herself which instruction she duly complied with. He thereafter also undressed himself and then he had sexual intercourse with her. She did not offer any resistance further as he had threatened that he would kill her. When he completed having sexual intercourse with her, he then instructed her to get dressed.

[5] They then proceeded to walk towards the shack of the appellant and on their way there they met up with a group of male persons, from whom the appellant requested a cigarette. As this group was attending a party at the said house, the appellant started socializing with them and she remained outside the yard, waiting for the appellant. She testified that she did not raise alarm at this point, as she was afraid for her life. After a short while the appellant escorted her to his shack. At his shack he once again instructed her to get undressed and then he raped her for second time penetrating her vaginally. The appellant then fell asleep.

[6] The complainant then saw this as an opportunity to make an escape from his shack, which she had found to be unlocked. On her way home she then telephoned her brother M. and informed him that she was walking home. *En route* she then met up with Senzo and the others who all came looking for her

and on her arrival at her parental home she then reported that she had been raped twice by the appellant and that she had left him asleep inside his shack. When the police later arrived at her house she gave the police directions to his shack and the appellant was later arrested by the police inside his shack.

[7] In his defense the appellant alleged that on the evening in question he met the complainant at Booysens tavern. She was known to him, as she used to pass by the carwash where he was working situated not far from her house. They immediately struck up a conversation and she enquired from him as to whether she could go with him. He first wanted to go and get a cigarette and as a result he left her standing outside the tavern. Upon his return he saw that she had left and he then started walking away. Along the way, he then noticed the complainant fighting with an unknown man. He then immediately came to her rescue by picking up a bottle with the aim of striking this male. He however missed and this male then ran away.

[8] The complainant was crying and appeared to be injured. She requested the appellant to accompany her home. Before reaching her home, they however then decided that they would first make a stop at the house of one of his friends who was hosting a braai. He testified that they arrived at this house holding hands and that he had introduced her to his friends Simphiwe and Nthembu. It was at this very braai that he proposed love to her. After some time had passed, she informed him, that she wanted to leave. They then proceeded to his house and later that evening engaged in consensual sexual intercourse. Thereafter he fell asleep and he was then later awoken by the police and arrested on allegations of rape.

[9] On 5 August 2015, the regional court in Roodepoort convicted the appellant of two counts of rape falling under ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (*the Act*) and sentenced him to a term of life imprisonment for both counts taken together. The appellant now approaches

this court in terms of the provisions of Act 42 of 2016, which provides for an automatic right of appeal, both against his conviction and sentence.

AD CONVICTION

[10] The appellant's grounds of appeal in respect of his conviction were, that the complainant was a single witness and that her evidence was not given in a satisfactory manner. In addition, thereto, the appellant contended that the state witnesses did not give evidence in a satisfactory manner and that indeed the evidence of the state witnesses was fraught with improbabilities.

[11] In opposition the state had argued that it was common cause between the parties, that the complainant was assaulted on the night in question, and that she had sustained injuries to both her face and vaginal vault. In addition, thereto, that the appellant had sexual intercourse with the complainant on the night in question. What remained in dispute, was whether it was the appellant who assaulted the complainant on her cheek and whether sexual intercourse was more than once and without her consent.

AD SENTENCE

[12] The appellant's grounds of appeal in respect of his sentence were that the court below had over emphasized the seriousness of the crime without sufficient regard to his personal circumstances, in particular, that he was a first offender. Secondly that the *court a quo* did not emphasize sufficiently the two years he had spent in custody awaiting trial; for this the appellant relied on *S v Dhlamini* 2012 (2) SACR 1 (SCA). In addition, the appellant also relied on the decision of *DPP v Gcwala* (295/13) [2014] ZASCA 44. Moreover, it was contended that the sentence of life imprisonment was disproportionate to the crime and counsel appearing on behalf of the appellant submitted that the sentence should be replaced with one of 18 years' direct imprisonment.

[13] On behalf of the State, counsel submitted that the trial court did take into account the trite factors normally taken into account for the purposes of sentence. Furthermore, that the imposition of sentence is in the discretion of

the trial court and that a court of appeal should not interfere with this discretion for frivolous reasons, or merely because it would have exercised its discretion differently. Counsel submitted that rape is regarded by society as one of the most heinous crimes and that the experience is so devastating in its consequences, that it is rightly perceived as striking at the foundation of humanity, particularly a female person's privacy, dignity and personhood. It is for this reason that our Courts are duty bound to send a clear message not only to the appellant but to other potential rapists, and to the community, that our courts are determined to protect the equality, dignity and freedom of all women, and that the courts will show no mercy to those who seek to invade those rights. Counsel relied on *S v Rabie* 1975 (4) SA 855 (A); *S v Sadler* 2000 (1) SACR 331 (SCA) at 335 e-g; *S v C* 1996 (2) SACR 181 (C); *Holtzhausen v Roodt* 1997 (4) SA 766 (W); *S v Chapman* 1997 (3) SA 341 (SCA).

[14] Counsel further submitted that under the minimum sentencing regime, in the absence of a finding that substantial and compelling circumstances exist, a sentencing court is obliged to impose the minimum sentence. Counsel also relied on the decision of *S v Nkomo* 2007 (2) SACR 198 (SCA), wherein in the minority judgment it was held that the prospect of rehabilitation and the appellant being a first offender did not constitute substantial and compelling circumstances.

EVALUATION

[15] In respect of the assault with a bottle perpetrated on the complainant, corroboration thereof is found in the evidence of Mr. Mfundiso Ngxolo. The witness testified that on the night in question, as he was walking home with the complainant, they met up with the appellant who approached the complainant and had first enquired as to whether the complainant knows the witness. The appellant then started dragging the complainant and then hit her with a beer bottle which struck her under her right eye.¹ The evidence as testified to by the complainant confirms having been assaulted by the

¹ See Record pages 6 and 7

appellant as testified to and corroborated by Mr. Ngxolo.² Furthermore, Exhibit A, page 4 confirms that the complainant upon examination had a red right eye and bruised skin, both underneath her eye and in the centre of her forehead, and that her face was also swollen.

[16] With reference to the assault with a bottle on the complainant, the appellant when he testified, confirmed that he had picked up a bottle but used the said bottle to strike another unknown gentleman, who was fighting with the complainant and from whom he ultimately rescued the complainant.³ The appellant thereafter made a startling revelation, that throughout the whole encounter on the night in question, that he never noticed any injuries on the complainant.⁴

[17] The trial court in my view, correctly concluded that Mr. Ngxolo corroborated with reference to the assault, the evidence as tendered by the complainant.⁵ The medical evidence was also supportive of an assault caused by blunt trauma. The appellant's version was that, albeit that he was the one who rescued the complainant from an attacker, he is nevertheless given the blame by the complainant as her attacker. This version was simply improbable and false and was correctly rejected by the court.

[18] It is correct that in relation to the rape that the complainant was a single witness and counsel appearing for the state properly submitted that the appellant may be convicted on the single evidence of any competent witness.⁶

[19] Paragraphs 4 and 5 *supra*, sets out the complainant's evidence in relation to the rapes. Her evidence that she was raped twice, was repeated to the medical practitioner Dr. Dawood,⁷ in relation to the J88 (Exhibit A) and

² See Record page 29 Lines 5-6

³ See Record page 101A.

⁴ See Record page 101A.

⁵ See Record page 205 Lines 10-11.

⁶ Section 208 of Act 51 of 1977.

⁷ See Record page 75 Line 25.

confirmed by her mother Ms. N. T.⁸ In contrast however, the arresting officer Constable Honono gave evidence, that when he reported to the residence of the complainant the same evening, the complainant merely reported that she was raped once after having been pulled by a man to Phase 1 in Tshepisoong,⁹ and that the complainant never reported to him that prior to being taken to the shack, that she was raped by the appellant in an open space.

[20] Constable Honono however when confronted with his arresting statement and the omission contained therein that he had failed to record in his statement that the complainant during her report made to him, also informed him that she was pulled by the appellant to his shack.¹⁰ He further conceded on a question posed by the court, that he was unable to remember as to whether the complainant had informed him that when she was first pulled into the veld by the appellant where he first had raped her and later that he had raped her in his shack.¹¹ His evidence on the number of rapes which was reported to him by the complainant was as a result contradictory and on the whole unsatisfactory.

[21] This evidence of two rapes having occurred was also confirmed by the evidence of Mr. Ngoxolo.¹² If one further have regard to the evidence of the complainant's brother, that is Mr. P. T, he similarly confirmed during evidence-in-chief, that the complainant reported to him just past a week after the incident, that she was on the evening in question, in the company of Senzo when she was pulled by the appellant; assaulted with a beer bottle in her face up until they were in a shack in Phase 1; and it was there where she was raped by the appellant.¹³ This witness only during cross-examination confirmed that the complainant had also informed him that when she was

⁸ See Record page 94 Line Lines 11-15.

⁹ See Record page page 84 Lines 20-22.

¹⁰ See Record page 86 Lines 12-19

¹¹ See Record page 87 Lines 8-15

¹² See Record page 11 Lines 15-19

¹³ See Record page 65 Line 25; Page 66 Line 1.

pulled, she was also raped by the appellant as they had passed through this open space.¹⁴

[22] The appellant throughout his evidence testified that he only had sexual intercourse with the complainant.¹⁵

[23] The trial court in its judgment¹⁶ and the complainant having been a single witness, could not have concluded that Mr. Ngxolo and Ms. T. provided credence to the evidence of the complainant. As far as the rapes in question are concerned the complainant remained a single witness. The trial court could however have convicted the appellant on the single evidence of any competent witness.

[24] In the decision *S v Sauls and Others* 1981 (3) SA 172 at 180E-F Diemont JA held as follows:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial court will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

[25] The trial court in our view correctly concluded that the complainant presented her evidence in a candid and unrehearsed manner and that she was not contradicted by any of the state witnesses, with regards to material aspects of her case.¹⁷

[26] After considering the evidence submitted in mitigation, the trial court had found that there were no substantial and compelling circumstances present

¹⁴ See Record page 68 Line 18-19.

¹⁵ See Record page 101B Line 12

¹⁶ Judgement Record, page 205 Lines 1-5

¹⁷ See Record page 204 and 2015

justifying a deviation from the prescribed minimum sentence and imposed a term of life imprisonment in respect of counts 1 and 2.

[27] The imposition of life imprisonment could have occurred where the evidence demonstrated that two rapes had occurred which would have brought the offence within the ambit of the provision of section 51(1)(a) Act 105 of 1997.

[28] The trial court further lamented the prevalence of the crime of rape and assault on women and children and this despite the warnings by the courts and robust sentences imposed by the courts. It noted that the complainant was only sixteen years old at the time and that the accused was violent and callous during the attack on her when he struck her with a bottle in her face. The court accepted that the attack on the complainant must have caused her intense physical and psychological trauma.

[29] It noted the personal circumstances of the appellant to include his relatively young age being 25 years when he committed the offences, but that he was not a child and that he was a first offender with only his mother as a dependant. At the time of his arrest he was employed as a general labourer at a tavern where he earned R 850 per week. On this basis it found no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. Not even the appellant's time in custody for two years moved the court to consider a lesser sentence.

[30] Having regard to the sentences imposed by the trial court, we could find no misdirection in respect the sentences so imposed.

[31] In the result and consequently the following order is made:

31.1 The appeal in respect of both the conviction and sentence is dismissed.

C.J COLLIS
JUDGE OF THE HIGH COURT

I agree

S. MOKOSE
ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

Appearances:

For the Appellant : Adv. R. Xaba
Instructed by : Legal Aid South Africa

For the Respondent : Adv. T. Byker
Instructed by : Director of Public Prosecutions Johannesburg

Date of Hearing :27 February 2018
Date of Judgement : 28 March 2018