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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Appeal No: AR 271/20

IN THE MATTER BETWEEN:

**TUWA AMIN YUSUF
ALIYAH LALAJH
KONDWENI BANDA**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

THE STATE

RESPONDENT

ORDER

1. The appeal against conviction in respect of the first count of kidnapping and the second count of rape is dismissed in respect of all the appellants.

2. The appeal against sentence on the first count that is, the count of kidnapping, succeeds to the extent that the sentence of fifteen (15) years' imprisonment is set aside and it is substituted with a sentence of ten (10) years' imprisonment. This sentence is antedated to 27 June 2018.
3. The appeal against sentence on the second count, the count of rape is dismissed in respect of all the appellants.
4. By operation of the law, the sentence on count 1 is to run concurrently with the sentence on count 2.

JUDGMENT

Hadebe J (Radebe J concurring)

[1] The three appellants in this matter were convicted on 27 June 2018 by the Durban Regional Court of count 1 - kidnapping, count 2 — rape, in contravention of s3 of the Sexual Offences (and Related 5 Matters Amendment Act) 32 of 2007. Subsequent to the said conviction and on the same day they were sentenced as follows:

On count 1 each appellant was sentenced to fifteen (15) years' imprisonment.

On count 2 each appellant was sentenced to undergo a term of life imprisonment.

[2] Leave to appeal against conviction and sentence on count 1, kidnapping was refused on 21 November 2018, however, granted on petition to the Judge President of this Division on 22 October 2020. The appeal against conviction and sentence on the second count of rape is before us in terms of **Section 309(1)(a) of the Criminal Procedure Act 51 of 1977, [CPA]**.

[3] All three appellants are challenging their conviction on the basis that the presiding officer misdirected herself in finding that the state had proved the case against the three appellants beyond reasonable doubt. The further argument is that the presiding officer erred in relying on the evidence of the state witness because of the improbabilities in the state's case as well as contradictions between the state witnesses. It is further argued that the evidence of the complainant should have been treated with caution as she was a single witness in so far as all the counts against the appellants are concerned.

[4] The further argument on behalf of the appellants is that the appellants had given a version that was reasonable and possible.

SENTENCE

[5] With regards to sentence the presiding officer is criticised for having failed to attach sufficient weight to the traditional, mitigating factors and that in the circumstances she failed to exercise her sentencing discretion properly and judiciously. In the circumstances it is argued that the sentence of life imprisonment (on the second count) is shockingly inappropriate in the light of the fact that the complainant did not suffer any vicious injuries when the offences against her were committed.

RESPONSE BY RESPONDENT

[6] In its response, the respondent submits that the evidence of the complainant was clear and satisfactory in every material respect, and that there are no improbabilities in the state's case. The argument in the respondent's case is that the appellants' version is not reasonably, possibly true and that it defies all logic. In the circumstances it is argued on behalf of the respondent that no misdirection can be found in the magistrate's analysis of the facts in this matter.

[7] On sentence the respondent cites the prevalence of this type of offences in this country and that in this particular case, the complainant was brutalised by the three appellants in the worst possible way. The further argument is that complainant was humiliated and that her whole life has been destroyed by the three appellants. In the circumstances the submission on behalf of the respondent is that, taking into

consideration what the complainant was put through by the appellants, a sentence of life imprisonment in the circumstances cannot be said to be shockingly inappropriate.

FACTS

[8] The background facts in this matter are that the complainant was kidnapped and locked up and kept captive as a sex slave by the three appellants for three days. They took turns in raping her continuously in the three days. She was not offered any food, only a little bit of water to wash. When she finally managed to escape on the evening of the third day, she produced identity kits to the police, these were based on her impressions of the three appellants having spent the time she did under the watchful eye of the appellants. The appellants were arrested ten (10) days after the complainant had escaped from where she had been locked up.

[9] The first appellant pleaded consensual sex with the complainant. He was linked by DNA evidence. The second and third appellants pleaded a bare denial.

FINDINGS

[10] In her reasons for judgment the presiding officer found that:

- 10.1 from the description of the complainant of her assailants it was established that the appellants were not disputing their identity.
- 10.2 that from her evidence, the complainant was able to identify her assailants and also to see what was taking place in the room where she was.
 - She warned herself of the fact that since the complainant was a single witness in respect of both counts the law dictated that she should exercise caution in dealing with her evidence.

- She found the complainant to have related her story in a coherent manner and that nothing suggested that she was making it up or was imagining things, despite the fact that she was testifying about events that had taken place almost two years before her testimony in court.
- She found that certain aspects of the complainant's evidence, were confirmed by the evidence of the complainant's grandmother.
- She found the evidence of the three appellants to be improbable and contradictory.
- She found that the evidence of the defence witness did not take the case of the (1st) appellant any further. She actually found that she could not accept the version of the defence witness due to discrepancies between his and the version of the 1st appellant.

[11] The presiding officer eventually concluded that the version by the defence was so improbable so as not to be reasonably possibly true. She accordingly rejected it. She accordingly found that the state had proved its case beyond reasonable doubt and convicted the three appellants.

CONCLUSION

[12] The evidence in this matter suggests the perpetration of gruesome, cruel treatment of the complainant by her captives over a long period. She was treated inhumanely, not offered food for over three days and was deprived of her freedom against her will. She was raped repeatedly by three men, was ridiculed in the process, told to take a bath as she was stinking. She was kept away from her family, her grandmother in this case. She was dealt with as a thing, the perpetrators, the appellants before court would insert their fingers in her vagina when it suited them and also their penises as they pleased. She was vulnerable in their hands and they

did as they pleased, she was not in a position to protect the integrity of her body in the circumstances. As if that was not enough, she had to come to court, be subjected to lengthy cross examination and to listen to the mendacity of the three appellants who fabricated and changed their version at every turn. In my view, if any physical injury would have resulted in all of this it would have paled into insignificance considering that the entire being of the complainant, the physical being, the emotional being and the spiritual being was completely murdered and destroyed by the three appellants. To argue that she did not suffer any injuries in the face of what happened to her is neither here nor there.

[13] Presented with the evidence that was led before her, the Regional Magistrate had no other option but to return a verdict of guilty against the three appellants. To do otherwise would have entailed a failure and a travesty of justice on her part. The evidence was overwhelming, notwithstanding the fact that the complainant was a single witness. She was a consistent, coherent and very brave young woman. "If a trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny a court of appeal will not readily depart from his conclusions" (**as per S v Leve 2011 (1) SACR 87 (ECG) at [8]**). A consideration of the record in this matter shows that the presiding officer went through the evidence with a fine comb and eventually arrived at her findings. Her reasoning cannot be faulted. Neither do I find any misdirection in her finding all the appellants guilty as charged. Accordingly, the appeal on conviction in respect of all the appellants falls to be dismissed.

[14] The appellants' heads of argument do not necessarily deal with the sentence on the first count of kidnapping. It seems the concerns of the appellants relate to the sentence of life imprisonment in respect of the second count of rape. The offence of

kidnapping is ordinarily a common law offence, however, where the provisions of the Criminal Law Amendment Act, 105 of 1997 were to be invoked then this offence would fall under Part IV of Schedule II of the said act wherein a first offender would upon conviction be sentenced to a period of not less than 5 years. The proviso to s52(2) empowers a regional court to impose a maximum term of imprisonment that shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years. The provisions of the Criminal Law Amendment Act were not invoked in the case of the count of kidnapping. The presiding officer seems to have relied on her sentencing jurisdiction, she sitting as a regional court. The presiding officer considered that the offence of rape was perpetrated by the appellants in pursuance of a deliberate violation of the complainant's rights for their own perverted gratitude.

[15] It is clear that from the explanation of rights, there was no indication that the appellants were prepared by way of being informed that if they were found guilty on the first count, the court would consider imposing the maximum sentence that the jurisdiction of the regional court allows it to. In this regard, we are of the view that there was a misdirection on the part of the presiding officer in so far as the sentencing on the count of kidnapping is concerned. Sitting as the appeal court, we are at large to interfere with this sentence and to ameliorate it.

[16] Dealing with the sentence on the rape charge, the complainant was brutalised, physically and emotionally. The pain was long and sustained. The complainant was a virgin. No evidence has been led to gainsay that. She had left the comfort of her grandmother's house to go and stay at a convent in a completely different province in Mpumalanga because that was the life she had chosen for herself. Those dreams are shattered through no fault of hers. Her grandmother advised court that the

complainant has become a hermit, she feels unclean, she is on tablets, she had to go onto ARV's by reason of the exposure to HIV as no condom was used during the rape on her.

[17] In her victim impact statement the complainant indicated that her sleeping patterns had been altered, she had flashbacks. She's afraid of being alone. The blame syndrome has started, she feels she has failed God for losing her virginity even though this was a situation she had no control over. She indicated she attempted suicide a number of times. She feels unworthy, dirty and not good enough. She has developed eating disorders. She finds life boring and hopeless, she has no regard for the future. She says she feels tired of being in that dirty, unclean body. She is on a range of medication, antidepressants, anxiety medication, sleeping tablets and she had to undergo psychiatric treatment and to see a psychologist for at least once a month.

[18] All these are the results of the brutal rape that was perpetrated by the appellants on this young, innocent girl. What the appellants have done is, they have abused the hospitality of this country. They have offended against the people of this country. They have to be punished in terms of the applicable laws of this country. The courts must express their indignation against the actions of people who act like the appellants. A strong message must be sent that our young girls are not to be preyed on by sexual predators like the appellants. Like vultures they lay in waiting for this innocent girl and they pounced on her. For reasons best known to the appellants, when they came to this country they decided to operate under pseudonyms. For seven years, their "so called" employer has known them by completely different names. The same goes for the third appellant who confirmed that he uses more than one name whenever it suits him. This act on the part of these appellants is very

concerning to this court, more so, because if we accept the credibility of the complainant's evidence, which we have done by finding no misdirection by the presiding officer, then we have to accept that in the room where the complainant was kept, there was a young, naked young girl, who gave the complainant her name as that of T.D.

[19] No one knows what the fate of that young girl became. According to the complainant's evidence, the girl was as good as dead from the weak pulse that she detected on her. She was removed from the room where the complainant was before the complainant escaped from her captivity. It can only be hoped that the members of the police managed to do a follow up, and we can only hope that the young girl was found alive. This country is known as the crime capital, that is our international status. It is a sad reality that when the minister of police announces the crime statistics, there is no face to match a particular crime. It is a blanket reference to the crime in South Africa. One wonders how much of what this court is dealing with today goes out to the world at large, for it to know that such incidents fuel the crime statistics in this country.

[20] Having considered the sentencing procedure, nowhere on the record was it ever submitted that the second and third appellants committed these crimes due to their youthfulness. As such as we sit as the appeal court, we have not been advised as to how their youthfulness influenced them to commit these heinous crimes. None of the appellants showed even the slightest indication of remorse during the process of the trial in these proceedings.

No sympathy was shown even to the grandmother of the complainant who was sent, by the system, from pillar to post looking for the complainant, whilst in the meantime the appellants were keeping her to satisfy their despicable desires. I am satisfied that

his rape ranks amongst some of the worst rapes that this court has ever sat on appeal in. Having considered the circumstances of the commission of the second offence of rape, I am of the view that the sentence of life imprisonment is neither inappropriate nor does it evoke a sense of shock.

[21] People like the appellants do not belong in civilised societies, they pose a serious danger and threat to the communities they live amongst, especially the young girls and women of this country. They deserve being removed from the society for a long time, then the people in their communities will be able to go on with their lives without having to look behind their shoulders every time they have to leave their homes. The sad part is that the appellants got engaged in these nefarious activities under the guise of being religious men who went for prayers every day. Their actions are contrary to what they got up to and if they were left to live amongst the communities, the danger and the insecurity of the communities would be increased. It is for this reason that I am satisfied that the sentence of life imprisonment is the appropriate sentence in respect of each of the three appellants.

[22] In the circumstances I propose the following order:

- 22.1 The appeal against conviction in respect of the first count of kidnapping and the second count of rape is dismissed in respect of all the appellants.
- 22.2 The appeal against sentence on the first count that is, the count of kidnapping, succeeds to the extent that the sentence of fifteen (15) years' imprisonment is set aside and it is substituted with a sentence of ten (10) years' imprisonment. This sentence is antedated to 27 June 2018.
- 22.3. The appeal against sentence on the second count, the count of rape is dismissed in respect of all the appellants.

22.4 By operation of the law, the sentence on count 1 is to run concurrently with the sentence on count 2.

Hadebe J