

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: A127/2020

In the matter between:

M[...] E[...] T[...]

Appellant

And

THE STATE

Respondent

JUDGMENT

van der Westhuizen, J (Lingenfelder, AJ., concurring)

[1] The appellant was convicted in the Regional Court Pretoria on a charge of theft and two charges of rape. The appellant was sentenced on the charge of theft to two (2) years imprisonment and to two life sentences in respect of the rape charges. The sentences were directed to run concurrently. In view of the provisions of section 309(1)(a) of the Criminal Procedure Act, 51 of 1977, the appellant enjoys an automatic right to appeal. The appellant appeals against both conviction and sentence. The appellant enjoyed legal representation throughout.

[2] The court *a quo* thoroughly considered the evidence placed before it and in particular considered the credibility of each of the witnesses. The court *a quo* held, after correctly applying the cautionary rules, that the complainant was a credible and truthful witness. Support was found in the evidence of an independent witness who assisted the complainant after her ordeal.

[3] The complainant, together with her friends, was at a tavern. She drank two dumpies of alcohol. They decided to go to a second tavern. Soon after they had arrived there, the complainant decided to return to the first tavern. She left on her own. On her way back to the first tavern, she was accosted by the appellant. He was assisted by two other males. The appellant stripped her of her clothes, in particular the pants that she was wearing. She was held by the two other males while the appellant sexually penetrated her vagina. The appellant tried to kiss her, but she held her mouth closed. The appellant then bit her on the cheek. The said three perpetrators then dragged her screaming to the hostel while she was naked. Inside the hostel, one of the other two males penetrated her vagina. When she screamed, the second perpetrator put a finger in her mouth to prevent her from screaming. A knock on the door interrupted the sexual assault on the complainant. A male person enquired what the noise was about. That person then demanded that they leave the room. He was awakened by the screaming. One of the other two perpetrators left. The appellant took the complainant's jacket with her cell phone that was in one of the pockets. They then dragged her to a second room where the appellant sexually penetrated her a second time. When he was finished, the other perpetrator also raped her a second time. The person who interrupted the incident in the first room returned again enquiring about the noise. The perpetrators ran away. The appellant left in the direction of that of the other male who had left after the incident in the first room. He found the complainant naked and crying. He handed her a blanket to cover her nakedness and gave her money for transport. The complainant went to the police station to lay a charge.

[4] The appellant's version, that was rejected by the court *a quo*, was that he had consensual sex with the complainant and paid for it. The appellant only admitted to one act of consensual sex. The appellant's version in respect of the charge of theft was correctly rejected. If indeed he had paid for the complainant's sexual favours, it would not have been necessary for the independent witness to give the complainant money for transport. She had no pants on, and her jacket was gone. She was given a blanket to cover her nakedness.

[5] Considering the evidence as a whole and on a holistic approach,¹ it was proven that the complainant suffered multiple sexual penetration in a gang rape circumstance. Multiple sexual penetrations by different perpetrators were proven. The rejection of the appellant's version was correctly done by the court *a quo*. Having admitted sexual intercourse, albeit allegedly by consent, with the complainant, the evidence of the surrounding circumstances gives credence to the version of the complainant rather than to that of the appellant. On the appellant's version he was the only person present in his room. He denied having sexual intercourse with the complainant outside his room. That denial was correctly rejected. The complainant was stripped of her clothes by the appellant outside in the veld where she was raped the first time. The witness who found her in the second room was adamant that she was naked, no clothes were nearby, and for that reason he handed her a blanket to cover herself. He also gave her money for transport. The only inference that could be drawn was that she had no clothes with her and also that she was paid no money as alleged by the appellant.

[6] The evidence presented in the court *a quo* that the complainant was bitten on the cheek was never challenged by the appellant. The court *a quo* held, in my view correctly so, that the objective facts before that court clearly indicated that the complainant never consented to having sexual intercourse with the appellant.

[7] The court *a quo* correctly held that the appellant had formed two different intentions to rape the complainant. In this regard, and on the accepted facts, the appellant had sexually penetrated the complainant outside in the veld the first time. After dragging the complainant to the room in the hostel, the complainant was sexually penetrated by one of the other perpetrators when the independent witness enquired for the first time about the noise. Thereafter, in the second room the appellant sexually penetrated the complainant a second time. Clearly a second intention to rape the complaint a second time had been formed by the appellant. There was a clear difference in time and place.²

¹ *S v Van Aswegen* 2001(2) SACR 97 (SCA)

² *S v Blaauw* 1999(2) SACR 295 (W)

[8] In my view, the appellant failed to show that the court *a quo* had erred in the findings of fact. As such, the court of appeal is limited in interfering with those findings of fact by the court *a quo*.³

[9] It follows that the appellant was correctly convicted in respect of the charge of theft and the two charges of rape. The appeal against the convictions stands to be dismissed.

[10] The appeal in respect of sentence is directed at the imposition of two life sentences. It is submitted on behalf of the appellant that the court *a quo* had erred in sentencing the appellant separately on the two charges of rape. It is submitted that the court *a quo* should have taken the two charges of rape as one for purposes of sentencing. There is no merit in that submission for what follows.

[11] On behalf of the appellant it was submitted that the state only proved one act of sexual penetration on the first occasion outside in the veld. The appellant ignores that it was held by the court *a quo* that the rape on the first occasion in the veld was in the manner of a gang rape. Secondly, the circumstances relating to the further acts of sexual penetration committed against the complainant inside the hostel were clearly that of a gang rape. That brought the provisions of section 51(1) of Act 105 of 1997 into play. It is recorded earlier that two distinct rapes were committed by the appellant, clearly separated in time and place and clearly in circumstances of being committed in gang related rape.

[12] It is submitted on behalf of the appellant that in respect of the first charge of rape, the appellant was a first offender and as such the minimum sentence should have been ten (10) years imprisonment. There is no merit in that submission. As held earlier, it was in a gang rape manner.

[13] Furthermore, the second rape of the complainant perpetrated by the appellant was similarly committed in a gang rape manner. Consequently, the provisions of section 51(1) of Act 105 of 1997 also apply. Two separate acts of rape were

³ *S v Prinsloo et al* 2016(2) SACR 25 (SCA)

perpetrated by the appellant upon the complainant which warranted the indictment on two counts of rape. The conviction of the appellant on two counts of rape required the imposition of separate sentences thereupon. It matters not that the same prescribed sentence of life imprisonment was to be imposed. The sentences were, as recorded earlier, to run concurrently.

[14] There is further no merit in the submission on behalf of the appellant that substantial and compelling reasons should have been found to have existed which would warrant a deviation from the prescribed sentence of life imprisonment, or for that matter in respect of the suggested ten (10) years imprisonment period for a first offender.

[15] The personal circumstances of the appellant put before the court *a quo* were: appellant's age at the commission of the offences being 27 years of age; unmarried, but has two children who are cared for by their mother; appellant dropped out of school in grade 8; prior to his arrest he was unemployed; appellant suffers from high blood pressure and did not receive medication whilst in custody; and has a previous conviction for house breaking with the intent to steal and theft for which he was sentenced to six (6) years imprisonment.

[16] None of the aforementioned personal circumstances on their own, or cumulatively, translate into substantial and compelling circumstances. Those are neutral facts. The issue of high blood pressure and receiving no medication whilst in custody has no bearing on the horrendous act committed upon the complainant. How a lack of education and employment sustains a finding of substantial and compelling circumstances was not explained. Cruel acts of rape were perpetrated by the appellant upon the complainant, who must endure the ordeal for the rest of her life. The court *a quo* correctly found no substantial and compelling circumstances to have existed that would warrant a deviation from the prescribed minimum sentence of life imprisonment. None have been shown to exist. This court of appeal cannot interfere with the imposed sentences in the absence of any misdirection shown to have been committed by the court *a quo*. The sentences imposed are not disturbingly inappropriate. A well-reasoned judgment on sentence was delivered by the court *a quo*.

[17] It follows that the appeal against sentence cannot be upheld.

The following order is made:

1. The appeal against the convictions is dismissed;
2. The appeal against the sentences is dismissed.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of Hearing: 07 June 2021

On behalf of Applicant: Ms M M P Masete

Instructed by: Pretoria Justice Centre

On behalf of Respondent: P C B Luyt

Instructed by: Director of Public Prosecutions

Judgment handed down: 17 June 2021