



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

Case No: AR545/2018

In the matter between:

NKOSINATHI VUKANI HADEBE

1ST APPELLANT

STHEMBISO STHE NDLOVU

2ND APPELLANT

NKANYISO MVANYELI SHEZI

3RD APPELLANT

and

THE STATE

RESPONDENT

ORDER

Appeal from: Regional Court , Pietermaritzburg (Mr. Jordaan sitting as a court of first instance)

1. The appeal against both conviction and sentence on count 1 is dismissed.

2. The appeal against both conviction and sentence on count 2 is dismissed.

JUDGMENT

Mngadi J (Laing AJ concurring)

[1] The appellants with leave granted on petition appeal against conviction and sentence on the count of rape. In addition, also by leave granted on petition, the second appellant appeals against conviction and sentence on the charge of assault with intent to do grievous bodily harm (count 2).

[2] The appellants were charged before the regional court with one (1) count of rape in contravention of section 3 of the Sexual Offences Act and Related Matters Act No: 32 of 2007 (count 1). The charge was read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act No; 105 of 1997 in that the victim was raped more than once by the accused or by any co-perpetrator or accomplice. In count 2 it was alleged that on the same date as in count 1, the second appellant stabbed Dumisani Dlamini with a knife causing him certain injuries with intent to do grievous bodily harm. One legal representative represented the first and third appellants and the second appellant had his own legal representative. When the charges were put to the appellants, they pleaded not guilty and elected not to disclose the basis of defence. The learned regional magistrate after hearing evidence convicted the appellants as charged. The court sentenced each appellant to ten (10) years imprisonment on count 1. The court sentenced the second appellant on count 2 to three (3) years imprisonment.

[3] The State to prove the case against the appellant called eight witnesses. The appellants after the application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 was refused closed the defense case without testifying and without leading any evidence.

[4] The incident took place on 9 October 2010. The case against the appellant commenced on 14 March 2014. On 30 April 2014, the regional magistrate refused the application for leave to appeal. On 13 February 2019, the appellants on petition were granted leave to appeal. On two previous occasions this court ordered the reconstruction of the record of the proceedings. The reconstruction was partly done. The reconstruction of the judgment on conviction is very poor. It does not contain any proper analysis and evaluation of the evidence. The regional magistrate deposed to an affidavit to the effect that no further and better reconstruction could be done. The appellants did not testify in the trial. In my view, the view of the trial court relating to the credibility of the witnesses cannot be given much weight in the absence of proper reasons. The duty falls on the appeal court to closely scrutinize the evidence on record, make its own analysis and evaluation and form its own conclusions.

[5] The complainant testified that she was 37 years old. She knew the first and third appellants. She stayed in the same area with them. She did not know the second appellant prior to the incident. She was on friendly terms with first and third appellants although they were much younger than she was.

[6] The complainant testified that at about 8PM, she left Y2K tavern walking with Dumisani Dlamini. Dumisani was her neighbor and she walked with him because it was late. She was proceeding to her home. She testified that not far from the tavern they met with the three appellants. The appellants were proceeding to the tavern. They greeted each other and proceeded in opposite directions. The appellants turned around and followed her and Dumisani. They caught up with them. They asked Dumisani whether he was in her company. He answered in the affirmative. The appellants said from now

they were going with her. The third and second appellant said that. She and Dumisani laughed because they thought the appellants were joking.

[7] She testified that the second and third appellants grabbed her. They dragged her up along the road. Dumisani tried to intervene. The second appellant took out the knife. He stabbed Dumisani in the arm. Dumisani ran away. The appellants took the complainant to the third appellant's home. She was resisting and screaming but nobody came to her assistance. At the gate, she broke loose and she ran to the main house. She found the third appellant's mother sitting on the bed. She told her that the appellants wanted to rape her. She asked the third appellant's mother to accompany her to her home but she refused. She hid herself under the bed.

[8] She testified that she heard the appellants entering the house. They enquired from the third appellant's mother of the complainant. They assured her that they did not intend to do anything to her. The third appellant's mother showed them the complainant under the bed. The appellants dragged the complainant out. The third appellant's mother scolded the appellants and she told them to leave alone the complainant. They released her and they pretended to be leaving.

[9] The complainant testified that she was crying. She pleaded with the third appellant's mother to accompany her home but she refused and told her to spend the night with her. She asked her to lock the door to keep the appellants out. The third appellant's mother agreed and they slept. In less than an hour the appellants returned. They got into the house. They grabbed her. She cried and she requested the third appellant's mother to intervene. She did not intervene and she told the complainant that she was less concerned about her. The appellants dragged her out into the outside building of the third appellant. They pushed her into the room and on to the bed. The second appellant slapped her and he put a knife on her neck. He undressed her of the pants and panty. He forced her thighs open and he raped her by inserting his penis into her vagina. The second appellant finished. The third appellant came and he also raped her. He forced her to bend over and he inserted his penis into her vagina.

[10] The complainant testified that when the second and third appellants were raping her, the first appellant was present he was seated on another bed and he was watching. He also raped her. While the appellants were busy chatting, she noticed that the door was not properly closed. She ran out and she went to the third appellant's mother again. She was naked from the waist. She told her that the appellants had raped her. The third appellant's mother called the third appellant, she asked the third appellant why they raped the complainant. The third appellant laughed. His mother told him to bring the complainant's clothes. The third appellant brought the clothes, the complainant dressed up, and she went away.

[11] She passed by Dumisani's home. She found his aunt and her daughter. She told them what happened and that the appellants raped her. She was told that Dumisani had not returned. The matter was reported to the police on Tuesday. It was on Friday evening when she left the tavern with Dumisani. She also reported the matter to her father. The police referred her for medical examination and the doctor examined her.

[12] Dumisani's aunt and her daughter as well as Dumisani were called as state witnesses. They confirmed that the complainant in the morning arrived at their home, and she told them that the appellants raped her. Dumisani too confirmed that he was with the complainant. He testified that they met with the appellants. He told the appellants not to take the complainant by force. The second appellant stabbed him with a knife on his arm and he ran away.

[13] The first and third appellants put to the complainant that the first and the third appellants bought beers. They went to the home of the third appellant and that they found her at the home of the third appellant and they all consumed beers. They all drank together. She left in the early hours on Sunday. The first appellant left the complainant with second and third appellants. The complainant denied what was put to her. She admitted that during the incident she lost her cellphone. The complainant confirmed what was in a police statement that the first appellant also raped her.

[14] The complainant stated that whilst third and second appellant held her by her arms, the first appellant held from the back. It was put to the complainant on behalf of the second appellant that he met complainant at Y2K tavern and consumed alcohol with her and she agreed to go home with him to the third appellant's home who is his cousin. She drank with him and the first and third appellant arrived. Third appellant said he wanted to sleep and he did not want any disturbance. The second appellant asked the complainant to leave and she left. She returned after 45 minutes and she accused the second and third appellants for stealing her cellphone and threatened to punish them.

[15] The complainant testified that she had not drunk any alcohol on the evening in question. In my view, the evidence of her spending sometime in the tavern and that of Dumisani suggested that she had consumed some liquor. However, it is not the defense version that she was so drunk that she would not know what happened. Therefore, the issue of whether she consumed some alcohol or not is not material. The complainant did not immediately report the matter to the police. However, there is ample evidence that she reported the rape at the earliest available opportunity to the mother of the third appellant and to Dumisani's family. The caution in an approach to the evidence of a single witness requires that it be clear and satisfactory in all material respects (*R v Mokoena* 1956 (3) SA 81 (A) at 85-86).

[16] In my view, the evidence of the complainant is logical and straightforward. It is satisfactory in all material reports. The appellant's suggestion that the complainant went voluntarily with them to the home of the third appellant and she shared drinks with them until she left without anything untoward happening is not supported by any other evidence.

[17] The complainants in her evidence is clear and detailed regarding how she was taken to the home of the third appellant. She is also clear and detailed in her evidence relating to what happened at the home of the third appellant. It is significant that the complainant testified that the third appellant's mother was at the home of the third

appellant and she saw what happened to her. It is understandable that the state would not easily succeed to call the third appellant's mother as a state witness. However, second and third appellants failure to call the third appellant's mother as a witness justify the inference that she would not have supported their version.

[18] The evidence of Dumisani Dlamini although he appeared hesitant and reluctant supported the version of the complainant that the appellants took her away from the company of Dlamini on her way to her home. The appellants' election not to testify and not to call any witness left the trial court with one version. It is trite that the accused has no onus to prove his innocence or persuade the court that his version is correct, if his version is reasonably possibly true, he is entitled to an acquittal. The fact that the accused has elected to give no evidence is factor leaning in favour of the acceptance of the evidence of the single witness (*Mokena* at 86G).

[19] What is put to the state witnesses as the version of an accused is intended to give a witness an opportunity to comment on it. It is no substitute for placing by means of evidence the accused version before court. Where an accused does not testify and he does not place any evidence constituting his version before court, the court is left with one version presented by the state. In addition, the medical examination found some injuries in the vaginal area of the complainant consistent with forceful sexual penetration.

[20] The accused put it to the complainant that she was falsely accusing them of the rape because she suspected them of stealing her cellphone. The detailed version of the complainant of what took place in the third appellant's home in the presence of the third appellant's mother and her soon after the incident reporting that she had been raped makes it unlikely that nothing happened to her and she was making up a story. In fact, she delayed making a report to the police, which is not indicative of reporting the rape as a revenge for losing the cellphone. There are indications, in my view, that the suggested reason is not in accord with the probabilities.

[21] On appeal against findings of fact, in the absence of a material misdirection by the trial court, its findings of fact are presumed to be correct. They will only be disregarded, if the recorded evidence shows that the factual findings are clearly wrong. See *S v Hadebe and others* 1998 (1) SACR 422 (SCA) at 4266; *R v Dhlumayo and another* 1948 (2) SA 677 A. The evidence given in the court below, evaluating it in the context of the entire body of evidence, and giving appropriate weight to it in the light of all the evidence and the inherent probabilities and improbabilities of the case, and exercising the necessary caution, I am of the view that the evidence proves the guilt of all the appellants as charged beyond reasonable doubt.

[22] The personal circumstances of the first appellant were the following. He was 32 years old. He was not married. He had a son aged four (4) years. He had grade 10 level of education. He was employed as a grass cutter earning R300 per week. The second appellant was 24 years old. He had grade 12 level of education. He worked as a taxi conductor earning R600.00 per week. He was not married and he had no children. The third appellant was 24 years old. He had standard 7 level of education. He worked as a general labourer for a construction company earning R4000.00 per month. He was not married and he had a son aged 11 years.

[23] The trial court regarded all the three appellants as first offenders. The first appellant had in fact two previous convictions, one of theft and one of assault. The third appellant had no previous convictions. All the three appellants had been in custody awaiting trial for three years and a half years.

[24] The appellants were convicted of very serious crimes of rape. The complainant was 35 years. She had a small build weighting 49 kg with a height of 140 cm. The doctor found on gynecological examination that she sustained multiple injuries in her vaginal area.. She was dragged screaming to the home of the third appellant. Her struggles and screams were ignored she escaped and she went to hide under the bed in the third appellants' mothers room. She was dragged out under the bed and she was taken to the

room of the third appellant. The appellants in turn each of them raped her over the night. She managed to escape and she ran naked to the third appellant's mother's room.

[25] Rape is a scourge in the society. It is directed to the vulnerable members of the society namely; women and children. It brutalizes the victim in her dignity, body integrity in her emotional and psychological profile. It leaves the victim with a long lasting trauma. The victims found it very repulsive. Courts are expected through sentences they impose to reflect society's resentment and distaste for the type of conduct (*S v McMillan* 2003 (1) SACR 27 (SCA)).

[26] The purposes of punishment are prevention, deterrence, rehabilitation and retribution. It is accepted that sentences in rape cases must reflect the element of deterrence. In *S v Zinn* 1969 (2) SA 537(A) at 540G the court held that in order to determine a fair and balanced sentence a triad consisting of the crime, the offender and the interests of society must be considered.

[27] The regional magistrate noted that the appellants were convicted of a crime for which the legislature has prescribed a minimum sentence of life imprisonment if no substantial and compelling circumstances are found to exist for a court to impose a sentence less than the prescribed minimum sentence. He found that the mitigating factors cumulatively constituted substantial and compelling circumstances resulting in the court imposing a sentence less than the prescribed minimum sentence.

[28] Imposition of sentence is primarily the function of the trial court. The appeal court can only interfere on limited grounds ,namely; if the sentence is disturbingly inappropriate or it is vitiated by a material misdirection or it is so severe that it induces a sense of shock. See *S v Malgas* 2001(1) SACR 469 (SCA) at 478e-g.

[29] Accepting that the appellants are young-men deserving a sentence with a view of rehabilitating them. They spent a long period in custody awaiting trial. The period they

spent in custody is not taken into account into consideration for purposes of placing them on parole. However, I am of the view that these weighty factors were taken into consideration by the regional magistrate in the determination of sentences imposed on the appellants. I am of the view that there are no grounds to interfere with sentence.

[30] I propose the following order:

1. The appeal against both conviction and sentence on count 1 is dismissed.
2. The appeal against both conviction and sentence on count 2 is dismissed.



Mngadi J

I agree, it is so ordered.



Laing AJ

APPEARANCES

Case Number : AR 545/18

For the Appellant : Bongani Mbatha

Instructed by : Legal Aid South Africa
PIETERMARITZBURG

For the respondent : Z M Sokhela

Instructed by : Deputy Director Public Prosecutions
PIETERMARITZBURG

Heard on : 27 August 2021

Judgement delivered on : 03 SEPTEMBER 2021

