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

CASE NO: AR208/2012

In the matter between:

MZWANDILE NGWADLA

Appellant

and

THE STATE

ORDERS

- [1.] The appeal against conviction is dismissed.
- [2.] The application for an increase in the sentence is refused.

JUDGMENT

HENRIQUES J

- [1] The appellant was convicted of rape in the Ixopo Regional Court. He was

sentenced to 8 years' imprisonment. With the leave of the court *a quo* he now appeals against his conviction only.

- [2] The hearing of the appeal was initially enrolled for 13 September 2012. However, the appeal was adjourned to 26 September 2012 as the State had indicated and gave the appellant notice of its intention to apply for an increase in sentence.

Conviction

- [3] In convicting the appellant, the court *a quo* essentially relied on the evidence of the complainant, S M. Ms M testified that during the evening of 16 December 2006 she attended a function at the Memla homestead. She had consumed alcohol at the function and was somewhat under the influence thereof. She left the party and proceeded on her way home. The path that she took led to a small river or stream which she had to cross. Upon reaching this stream she met the appellant who offered to carry her across the river. In return he informed her that he wanted her vagina. He indicated this by touching her on her vagina as well. She rejected his advances but he picked her up and carried her across the river. He thereafter lay her down and got on top of her, asking once again for her vagina. She screamed and the appellant summoned his erstwhile co-accused¹ who assisted him by blocking her mouth. She testified that she then felt a penis being inserted into her vagina. Of importance is her testimony that she did not see who inserted his penis

¹ The co-accused arrived after the complainant had been carried across the river.

into her vagina. However, at the time the appellant was on top of her. The following day the appellant attended at her homestead and apologised to her for having grabbed her and requesting that she give him her vagina.

[4] Ms M's evidence is corroborated by the medical evidence, which was handed in by consent. The J88 recorded the doctor's findings which were 'consistent with forced vaginal entry'.

[5] Mr Musawakhe Dweku testified that on the night of 16 December 2006 he was at his home in the company of his mother and sister. Their dogs were continually barking and he and his sister went out to investigate. He saw people running away and went to the area from which they were running from. There he found the complainant and upon enquiring as to what had transpired, was informed that the appellant and his erstwhile accused 2 'were strangling her and they were also opening her legs'.² Mr Dweku and his sister thereafter assisted the complainant. Of importance was Mr Dweku's testimony that he was present when the appellant arrived at the complainant's home and apologised for his behaviour the previous evening.

[6] The complainant's son Mr G M testified and confirmed that he was also present when the appellant arrived at his home and apologised to his mother for his behaviour the previous night. The appellant also then revealed the identity of the others who had assisted him.

² Record, pg 6 line 21

[7] The appellant testified and confirmed that he met the complainant on the evening of the incident at the river. The complainant had asked him to assist her in crossing the river and he and his companions obliged and assisted her. Once they crossed the river and having ascertained that she was safe and capable of walking home alone, they left her and returned to their own homes. He emphatically denied touching the complainant on her private parts and having requested to have sexual intercourse with her. He further denied that the following day he had apologised to the complainant for his behaviour. He testified that he was questioned by the complainant's son as to why he had simply left his mother at the river and had not accompanied her home and he apologised for not doing so.

[8] The court *a quo* was alive to the fact that the complainant was a single witness and that her evidence had to be treated with caution. The court *a quo* was also alive to the fact that the complainant was somewhat under the influence of liquor at the time of the incident. The issue before the court *a quo* was the identity of the person who had inserted his penis into the vagina of the complainant. Relying on the circumstantial evidence before it, the court *a quo* found that it was none other than the appellant who had inserted his penis into the complainant's vagina. In reaching this conclusion the court *a quo* found that it was the only inference which could have been drawn from the proven facts. These facts were, *inter alia*, the following:

- (a) that the appellant met with the complainant at the river;

- (b) that he assisted the complainant to cross the river;
- (c) that the medical report confirmed that the findings were consistent with forced vaginal entry;
- (d) that the complainant testified that she had been raped; and
- (e) when she screamed, the erstwhile accused 2 was summoned to block her mouth and silence her.

[9] The court *a quo* found that the only inference to be drawn was that the appellant was the person who had raped the complainant as he admitted to meeting her at the river and carrying her across the river. According to the complainant, he is the one who touched her vagina and stated that he wanted it in return for having assisted her across the river. He was the person directly on top of her at the time when she started to scream and when the erstwhile accused 2 was summoned to silence her. Indeed, it is improbable that the appellant would have wanted her vagina, touched it, climbed on top of the complainant and suddenly allowed someone else to penetrate the complainant.

[10] I can find no reason to fault the finding of the court *a quo* in reaching this conclusion.

[11] The court *a quo* also found that notwithstanding her having consumed

intoxicating liquor, the complainant was well aware of what was transpiring on that evening. This version of events is further corroborated by the finding of the erstwhile accused 2's belt at the scene. It was not disputed that the appellant and the erstwhile accused 2 were in each other's company that evening and that they met the complainant at the river. The erstwhile accused 2 could not explain how his belt came to be found at the scene.

[12] I am accordingly satisfied that the court *a quo* did not misdirect itself in convicting the appellant and the appeal against the conviction must fail.

Sentence

[13] The wording of the charge sheet in the court *a quo* is as follows:

'The accused is/are guilty of the crime of Rape (read with Section 51 Act 105/1997) in that on or about 16/12/2006 and at or near GABAZI in the District/Regional Division of Ixopo, the accused did unlawfully have sexual intercourse with S M aged 67 years Without her consent.'

[14] At the commencement of the trial, the magistrate informed the appellant as follows:

'Gentlemen, in terms of section 51 of section 2 of the Criminal Law Amendment Act, Act 105 of 1997, as amended, a minimum sentence that can be imposed is that of 10 years' imprisonment, if you are found guilty, unless the Court finds that there are substantial and compelling circumstances. I must also warn you that if the Court finds you guilty and if it also finds that you all had committed the offence in the furtherance

of common purpose, then the possible sentence that can be imposed is that of life imprisonment, unless the Court finds that there are substantial and compelling circumstances.’³

[15] The court *a quo* did not find that the appellant and his erstwhile co-accused had acted in the furtherance of a common purpose. The court *a quo* was therefore of the view that a minimum period of 10 years’ imprisonment was applicable and reiterated this saying so in the judgment on sentence.

[16] Counsel for the State has submitted that the sentence imposed was a misdirection and that the sentence ought to be increased. One of the glaring difficulties encountered in this approach is that the appellant was warned, at the commencement of the trial, of the minimum sentence applicable. The court did not find that the appellant and his erstwhile co-accused acted in the furtherance of common purpose and therefore did not consider imposing the minimum sentence of life imprisonment. I am of the view that to impose a sentence or to consider a sentence of life imprisonment or any sentence greater than that imposed by the court *a quo* would be prejudicial to the appellant. At no stage was he warned that he faced life imprisonment as the court *a quo* had now found that the provisions of the Criminal Law Amendment Act, relating to the imposition of life imprisonment, were now applicable.

[17] In *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) at para 11, the court held that the powers of an appellate court to interfere with a

³ Record, pg2 lines 19-25 and pg 3 lines 1-2.

sentence are circumscribed. The reason for this is that the determination of an appropriate sentence is pre-eminently within the discretion of the trial court.

[18] It is indeed trite that a court of appeal may only interfere with a sentence imposed by the trial court where the sentence imposed can be described as shocking, startling or disturbingly inappropriate.

[19] I am not persuaded that the court *a quo* misdirected itself in imposing the sentence which it did, nor am I of the view that the sentence imposed is shocking, startling or disturbingly inappropriate. As stated earlier, there is, in my view, no basis to impose the minimum sentence of life imprisonment and in any event, should same be applicable, it would be prejudicial to the rights of the appellant, given the findings of the court *a quo* in its judgment.

[20] I accordingly grant the following orders:

[20.1] The appeal against conviction is dismissed.

[20.2] The application for an increase in the sentence is refused.

HENRIQUES J

I AGREE

STRETCH J

Case Information

Date of argument : 13 and 26 September 2012
Date of judgment : 10 May 2017

Appearances

Counsel for Appellant : Mr K L Singh

Instructed by : Justice Centre, Pietermaritzburg

Counsel for State : Adv B Manyathi

Instructed by : Director of Public Prosecutions,
Pietermaritzburg