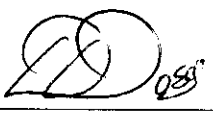


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG, PRETORIA)

CASE NO: A636/2012

|                 |                                                                                    |
|-----------------|------------------------------------------------------------------------------------|
| (1)             | REPORTABLE: YES / <u>NO</u>                                                        |
| (2)             | OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>                                       |
| (3)             | REVISED.                                                                           |
| <u>3/6/2013</u> |  |
| DATE            | SIGNATURE                                                                          |

3/6/2013

In the matter between:

**PRINCE DLOZI LUBISI**

**1<sup>st</sup> APPELLANT**

**SANTOS NYAMBANGA**

**2<sup>nd</sup> APPELLANT**

**PAUL MASHABA**

**3<sup>rd</sup> APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**J U D G M E N T**

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**DOSIO, AJ**

- [1] The appellants were arraigned on charges of rape and theft in the Nelspruit Regional court.
- [2] The appellants pleaded not guilty on both counts but were subsequently convicted and sentenced to life imprisonment on count one (1) and eighteen (18) months imprisonment on count two (2).
- [3] The appellants were legally represented during the proceedings
- [4] The appellants have an automatic right of appeal in terms of section 309 (1) (a) (ii) of Act 51 of 1977 as amended.

#### AD CONVICTION

- [5] The counsel for the respondent stated that the conviction in respect to the first and third appellant must stand. However, that it cannot support the conviction of the second appellant and concedes that his conviction and sentence on both counts should be set aside. The counsel for the respondent states that the second appellant was not previously known to either the first or second state witness, and there is no circumstantial evidence in support his identification.
- [6] This court cannot support the submissions made by the counsel for the respondent in respect to the second appellant.
- [7] The complainant was adamant that the third appellant raped her, followed by the first appellant, followed by the second appellant and then finally followed by the third appellant for a second time. At no stage did she hesitate in her evidence in chief or during cross-examination as regards the identity of the second appellant. She states she saw them all clearly from the electric light that illuminated the room. Her evidence at page 6 of the transcript states, "*I know number 2 on general appearance*". This evidence cannot be overlooked.
- [8] The complainant was an honest witness and gave her evidence in a clear and satisfactory manner. There were no material contradictions in her evidence.

- [9] The evidence pertaining to identification is fortified by the corroboratory evidence of Given Sibiya, who states he saw all three men in the house. He remembers clearly that appellant two (2) kept watch over the first and third appellant. He states that although he did not know the second appellant, he looked at all three in their faces and identified them from general appearance. This witness went one step further and even stated that the second appellant had a beard on his face and that the third appellant had long hair. Neither of these two identifying features in respect to either the second or third appellant was ever disputed during the cross-examination of Given Sibiya.
- [10] The evidence of Given Sibiya impressed this court. This court finds him to be an honest and trustworthy witness.
- [11] This court cannot overlook the fact that it is the first appellant who incriminated the third appellant, and that it is the third appellant who told the police where to find the second appellant. There is no other logical explanation for this, save that all three appellants acted together on this evening to enter the home of the complainant, to rape her and steal her items.
- [12] The appellants denied having committed the offences.
- [13] The first appellant did however place himself on the scene. Stating that he had sexual intercourse with the complainant and it was consensual. He admitted that he took the cell phone and the necklace with the consent of the complainant.
- [14] The second and third appellants denied they were at the scene or that they committed the offences.
- [15] In considering the judgment of the trial court, this court has been mindful that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.<sup>1</sup>

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<sup>1</sup> See S v Francis 1991 (1) SACR 198 (A) at 198 J-199A and S v Latha and Another 1994 (1) SACR 447 (A) on 453 d-g

- [16] The findings of the trial court were correct in accepting that the State had proved the guilt of the appellants beyond reasonable doubt.
- [17] This court does not find that the state's evidence regarding identity amounted to dock identification. The first appellant and the third appellant were well known to both the complainant and Given Sibiya. As regards the second appellant, the court accepts the evidence on identification given by the complainant and Given Sibiya as correct.
- [18] If the complainant had an affair with the first appellant and they had sexual intercourse on previous occasions, then there would have been no reason for her to have revealed this to her husband, as her husband had not seen anything.
- [19] It is also highly unlikely that the complainant would have colluded with Given Sibiya to fabricate a story of three men entering the house if it had only been one man, namely the first appellant.
- [20] There is no logical explanation for the first appellant to have taken the cell phone and a necklace of a person he had had consensual sexual intercourse with. The more logical explanation is that he took these items because he stole them.
- [21] The complainant and Given Sibiya both corroborated each other as to the sequence of events that unfolded.
- [22] The version of the first, second and third appellants that they had seen the complainant and her husband having a fight earlier on, is rejected by this court as false. The objective probabilities strongly support the version of the state witnesses.
- [23] The version of the first, second and third appellants is rejected by this court as false and not reasonably possibly true.
- [24] The findings of fact by the trial court were correct and it was justified in rejecting the evidence of the three appellants.
- [25] The trial court did not misdirect itself as regards conviction.

## AD SENTENCE

- [26] It is trite law that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.
- [27] A sentence imposed by a lower court should only be altered if:
- i. An irregularity took place during the trial or sentencing stage.
  - ii. The trial court misdirected itself in respect of the imposition of the sentence.
  - iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.<sup>2</sup>
- [28] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds. The fact that a court of appeal might have imposed a different sentence is not regarded as sufficient to interfere with the sentence imposed by the trial court.<sup>3</sup>
- [29] The counsel for the appellants stated that the charge sheet makes mention that the state was relying upon section 51(2) of the Criminal Law Amendment Act 105 of 1997 in respect to count one (1). The trial court then applied the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 and sentenced the appellants to an effective term of life imprisonment on count one (1).
- [30] Counsel for the appellants believes the trial court misdirected itself in applying the provisions of section 51(1) of Act 105 of 1997, as the appellants were not warned that this section would be applicable, and that their right to a Constitutionally fair trial had been infringed.
- [31] This court notes that at page one (1) of the transcript at lines 17-19, the trial court did explain to the three appellants that if they were found guilty of the offence of rape, the term of life imprisonment was applicable. The annexure to the charge sheet, with specific reference to count one (1), had "Life imprisonment" written on it.

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<sup>2</sup> See *S v De Jager and Another* 1965 (2) SA 616 (A), *S v Rabie* 1975 (4) SA 855 (A) and *S v Petkar* 1988 (3) SA 571 at 574 C

<sup>3</sup> See *S v Pillay* 1977 (4) SA 531 (A) at 535 E-G, and *S v Holder* 1979 (2) SA 70 (A) at 75 C-D

[32] It is clear that all three appellants and their legal representative were fully aware that life imprisonment was applicable.

[33] In addition, the recent judgment of the Supreme Court of Appeal, in the case of **S v Kolea 2013 (1) SACR 409** stated that; unless prejudice is shown to have resulted, the mere incorrect reference to section 51(2) instead of 51(1) cannot preclude a life sentence being imposed.

[34] Counsel for the appellants also submitted that the trial court erred in sentencing the appellants to life imprisonment as it over-emphasised the seriousness of the offence and the interests of society and under emphasized the personal circumstances of the appellants. It was further submitted that a term of life imprisonment is shockingly harsh and induces a sense of shock.

[35] The first appellant's personal circumstances were;

- i. He was twenty two (22) years old when the crime was committed.
- ii. He is a first offender.
- iii. He is married and has one minor child.
- iv. He was employed as a welder at HP Steel.
- v. His income was R1900-00 per month.
- vi. His father passed away and he was maintaining his mother.
- vii. He is the only breadwinner.
- viii. He has passed matric.

[36] The second appellant's personal circumstances were;

- i. He is twenty seven (27) years old.
- ii. He was employed as a general labourer.
- iii. His income was R700-00 to R800-00 per month.
- iv. He has a minor child aged six (6) years old.
- v. He is a first offender.
- vi. He maintains his child.

[37] The third appellant's personal circumstances were;

- i. He is 38 years old.
- ii. He is married.
- iii. He has three children.
- iv. He was self-employed and his income is R4000-00 to R5000-00 per week.
- v. He is a first offender.
- vi. He maintains his family.

[38] Counsel for the appellants argued that the trial court did not take into consideration the time period that the appellants had already spent in custody.<sup>4</sup> This court finds that the trial court had been mindful of the time spent by the appellants in custody. This is clear from page 69 of the transcript at line 2 to 3.

[39] Counsel for the appellants argued that this is not one of the worst cases of rape, and that some rapes are worse than others.

[40] This court finds that this rape is one of those serious rapes.

[41] The aggravating circumstances present in this case are;

- i. Three men entered the house of an innocent victim and raped her in the presence of a child and her husband who was sleeping in the same room.
- ii. She was badly assaulted having sustained injuries to her right eye, right shoulder and right cheek.
- iii. Two of the three accused knew the complainant and at no stage did they show any signs of remorse.

[42] Counsel for the appellants argued that the trial court misdirected itself in not asking questions or investigating whether there were substantial and compelling circumstances that could have influenced the court to reach a different conclusion.<sup>5</sup>

[43] It is clear to this court that in light of the serious attack on this innocent victim, and the number of times she was raped that the trial court was justified in not finding compelling and substantial circumstances to deviate from the minimum prescribed sentence of life imprisonment.

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<sup>4</sup> See *S v Brophy and another* 2007(2) SACR 56 (W) and *S v Vilakazi* 2009 (1) SACR 552 (SCA)

<sup>5</sup> See *S v Dhlamini* 2000 (2) SACR 266 (T)

[44] The sentence imposed by the trial court is justified and the appeal on sentence should not succeed.

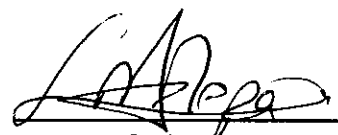
[45] In the premises the appeal is dismissed both in respect to conviction and sentence.



**D. DOSIO**

**ACTING JUDGE OF THE HIGH COURT**

I concur



**L.M. MOLOPA-SETHOSA**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

Date Heard: 3 June 2013

Handed down judgment: 3 June 2013

On behalf of the appellant: M B KGAGARA  
PRETORIA JUSTICE CENTRE  
2<sup>ND</sup> FLOOR, FNB  
POLOKWANE

On behalf of the respondent: Adv. P. VORSTER  
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