

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

Appeal Case No: AR 587/12

In the matter between:

THEMBEKILE KLAAS

APPELLANT

VS

THE STATE

RESPONDENT

JUDGMENT

Delivered on: 11 June 2013

MNGUNI J

[1] The appellant was convicted of contravening section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by the Pietermaritzburg Regional Court. The allegations were that on 16 January 2010 and at or near Cinderella Park, in the Regional Division of KwaZulu-Natal, he unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his genital organ into or beyond her genital organ without her consent. She was stabbed with a knife during the incident resulting in her suffering grievous bodily harm. The charge sheet was further read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997('the Act').

[2] The appellant pleaded not guilty to the charge and in his plea explanation denied all the allegations against him. The Regional Magistrate found him guilty as charged and sentenced him to a term of 20 years' imprisonment. The appeal is directed against both conviction and sentence, leave having been granted by the Court *a quo*.

[3] The evidence before the Court *a quo* relevant to this appeal is the following:

On 16 January 2010 at about 04h00 the complainant was walking on foot through Cinderella Park finding her way back home to Sobantu Village. She had been drinking with friends at a tavern, having arrived at 22h00 the previous night. She left her friends behind and proceeded home alone. She found herself at Cinderella Park informal settlement and struggled to find her way home. She came across Ms Khumalo who was wearing a uniform which identified her as an employee of the Spar Supermarket. She approached Ms Khumalo and asked her for the directions to Sobantu Village. Before she came across Ms Khumalo, she had heard a male voice coming behind her saying "hela". She was shocked when she heard that voice and started to walk fast.

[4] She told Ms Khumalo about a person who was following her and asked for her assistance. As she was busy talking to Ms Khumalo, the appellant joined them. She stood behind Ms Khumalo. Ms Khumalo asked her where she was coming from. She told Ms Khumalo that she had been at a tavern

with friends and was going home to Sobantu Village. She asked Ms Khumalo to show her the direction to Sobantu Village. Ms Khumalo suggested to the appellant that he should show her the direction because she was rushing to work. The place was lit with streetlights. At that point, the appellant turned to speak to Ms Khumalo. She observed that they were speaking to each other as if 'they were familiar with each other'. The appellant then pointed out to her the direction to Sobantu Village. She left them talking to each other and proceeded along the direction pointed out to her by the appellant.

[5] As she was walking along that direction, she heard the footsteps behind her. She increased her walking pace and attempted to run but she slipped and fell down because it was drizzling and the place was muddy. At that moment she realised that the appellant was coming for her with a knife in his hand. When she tried to pick herself up, the appellant grabbed her on the shoulder and stabbed her at the back. He then stabbed her again on the thigh and forced her into the nearby bushy area.

[6] Upon reaching the bushy area, he told her to undress but she refused. The appellant tried to stab her again but she managed to grab the blade of the knife with the right hand and she sustained a cut in the process. He resorted into throttling her with his left hand until he overpowered her. The appellant then pulled down her jean trousers and panty to the ankles. He thereafter pulled down his trousers, inserted his penis into her vagina and had penetrative sexual intercourse with her against her will. He made sexual movements until he became 'powerless'. When the appellant was at that

stage, she pushed him away, got up and ran away still naked. She only had a T-shirt which was hanging on the arm that she used to cover the private part. When she reached home, she found her brother outside the house at the water tap, who asked her what had happened. She was crying and was unable to explain to him. She was full of blood all over her body. Her brother ran into the house and came back with a towel which she wrapped around her waist to cover herself. The complainant's mother heard her crying outside, came to her and took her into the house. When she tried to find out what had happened, the complainant was unable to relate the story to her because she was still in a state of shock. Eventually, she managed to compose herself and told her what had happened. The complainant told them where the incident occurred and that she left some of her items of clothing on the scene. Her mother went to the scene and found most of her items of clothing except her shoes. The ambulance was called and she was taken to hospital where she received treatment. The matter was reported to the police.

[7] On 17 January 2010 Warrant Officer Pather fetched her and drove to Cinderella Park with her. On arrival, he parked the vehicle a distance away from a certain house, alighted and proceeded to that house, leaving her behind. He came back to the vehicle with the appellant and she identified him as her assailant. Mrs Mkhize is the mother of the complainant. In the morning on 16 January 2010 she was asleep when she was woken up by the voice of the complainant who was crying outside the house. She went outside to see what was happening. She found her with her brother and she had already covered herself with a towel around her waist. She was bleeding on her thighs

and knees. She asked her what had happened, and she told her that she was accosted and raped on the way back home. She gave a detailed account of what the complainant told her had happened. The complainant also informed her that she left some of her items of clothing at the scene. She went to the scene with Warrant Officer Pather and found some of her clothing.

[8] Warrant Officer Pather received information about the appellant on 17 January 2010. On receipt of the information, he fetched the complainant and drove with her to Cinderella Park. He arrested the appellant who was identified by the complainant as the person that assailed her on 16 January 2010.

[9] Dr Vanker conducted examination on the complainant on 16 January 2010. During the examination, he took the vaginal swab and the surrounding areas. The examination revealed that the complainant sustained a stab wound on the left thigh, some abrasions on the right thigh above the knee and a cut on the right hand little finger. The vaginal examination did not reveal any visible injuries but he emphasised that that conclusion did not rule out the forceful penetration of the vagina. His findings and conclusion were recorded in a form J88 which was received into evidence as exhibit "A".

[10] In his testimony the appellant denied that he had raped the complainant. He testified that he resided at Cinderella Park at the time of the incident. On 16 January 2010 he woke up early in the morning and went to Funeka's residence to give money to his relative who was going to buy the

grocery for him on the way back from work. On his way back home, he came across the complainant walking on the road to his opposite direction. Before they could meet, Ms Khumalo came out of her house and approached the complainant who was crying. Upon reaching them, Ms Khumalo asked him "Uncle, what have you done to this child", referring to the complainant. In response he asked Ms Khumalo "What does she say I am doing". At that moment the complainant immediately said to Ms Khumalo "No, it is not him" she thereafter asked them for the direction to Sobantu Village. She told them that she resided at Sobantu Village. Ms Khumalo showed her the direction. She then proceeded along the direction shown to her, leaving him and Ms Khumalo speaking to each other. After few seconds, Ms Khumalo left and proceeded to her work place. He also went home. He observed that her clothes were wet and her pair of trousers was muddy, and she had blood on her face and on her shirt. The complainant had told Ms Khumalo that she was coming from Lucky's Tavern where she and her friends were consuming liquor. She also told her that she had slept in the bush.

[11] Ms Khumalo was working at Spar Supermarket and resided at House 8444 Cinderella Park at the time of the incident. The appellant is her uncle. On 16 January 2010 at about 05h20 she was on her way to work when she came across the complainant. She was walking on the road when the complainant suddenly appeared walking and wobbling from side to side. The complainant first walked around her and thereafter stood next to her. At that moment the appellant was approaching three houses away from where they stood coming towards them. The complainant said to her "Oh please just tell

this man off for me” referring to the appellant. Ms Khumalo then said to her “okay, let me wait for him to come - to get closer”. When the appellant reached them, Ms Khumalo asked him “what did you do to the child?” but before he could respond, the complainant said “No, he did not do anything to me”. The appellant went away and she was left with the complainant. The complainant told her that she resides at Sobantu Village and she asked for the direction to Sobantu Village. She asked the appellant who, at the time, was standing outside the house to show her the direction but he refused. When he refused, she showed her the direction by pointing it out to her. She asked the complainant where she was coming from. She reported to her that she had been partying with her friends and had slept in the bush. She thereafter took the direction pointed out to her and she waited until the complainant disappeared from her sight. She testified that the complainant was strongly under the influence of liquor and the zip to her trousers was open exposing her private parts. She testified further that the complainant was carrying a pair of brown panties in one hand. She observed that she had blood on the hand and near her mouth. The thrust of her evidence was simply that the complainant was already injured when she approached her for the directions.

[14] The main thrust of the appellant’s attack against the conviction before us concerned the question whether the state had proved beyond a reasonable doubt that the appellant committed the offence he was convicted of. The court *a quo* was mindful of the fact that the complainant was a single witness in respect of the rape incident itself. Section 208 of the Act provides that a single

witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material respects. The evidence reveals that the complainant was attacked on the day in question. This finding is supported by the injuries and the state of her dress as described by the witnesses. The court *a quo*, correctly found that the motive for the attack was sexual assault because at the time when she arrived at home she had been substantially undressed.

[15] Counsel for the appellant submitted that the court *a quo* failed to consider that the medical evidence did not substantiate the complainant's version. In this regard, Dr Vanker's evidence was that the complainant was 22 years of age, she had one child and a number of pregnancies. From this, he concluded that she was sexually active. He testified that in his experience, these factors will militate against any vaginal or vulval injuries on the complainant.

[16] It is common cause that the complainant had started consuming liquor with her friends from 22h00 the previous night until at least 04h00 the following morning. The court *a quo* pertinently dealt with this issue and concluded that even though she had consumed liquor, she was able to see what was happening. Importantly, the evidence reveals that the complainant observed even the minute detail during the incident such as the fact that the appellant and Ms Khumalo "spoke to each other as if they were familiar to each other". Indeed the evidence demonstrates that the appellant is the uncle of Ms Khumalo. In my view, this observation speaks to the fact that the

complainant was aware and in control of her faculties when she was sexually assaulted. Importantly, she was able to direct her mother to the place where sexual assault was perpetrated on her.

[17] Counsel for the appellant raised the identification as an issue in her heads of argument. The evidence reveals that the complainant first saw the appellant after he had uttered the word “hela”. At that time the appellant was walking behind her. The complainant’s evidence is that she turned and looked at him. When the complainant approached Ms Khumalo for the direction to Sobantu Village, the complainant came and joined them. She was also able to see him when he approached and attacked her. In any event, the appellant and Ms Khumalo are not disputing that they were at the scene and had come across the complainant at some point during that morning, albeit their version being that she had already been assailed at the time. I am therefore satisfied with the reliability and dependability of her observation on the issue of the identification. In my view, the court *a quo*, correctly found that the appellant was the person who sexually assaulted the complainant on 16 January 2010.

[18] The Regional Magistrate was mindful of the fact that in order to establish whether the state had succeeded to prove the guilt of the appellant beyond a reasonable doubt, he was required to evaluate the evidence of each of the witnesses in the light of the totality of the evidence having due regard to the probabilities.

[19] It seems to me that before convicting him, the Regional Magistrate satisfied himself not merely that his exculpatory evidence and that of his witness was not true but also that every element of the offence was established by evidence that was truthful and reliable beyond a reasonable doubt. In my view, the reasons and findings of the Regional Magistrate in convicting him are unassailable and he was correctly convicted.

[20] The appeal also lies against the sentence of 20 years' imprisonment imposed by the court *a quo*. It is trite that the sentencing court has a wide discretion in imposing what it considers to be an appropriate sentence and that each case depends upon its own particular facts. It is so that the determination of an appropriate sentence requires that proper regard be had to the triad of the crime, the criminal, and interests of society.

[21] Importantly, a sentence must also, in fitting cases, be tempered with mercy. Circumstances, however, vary and the punishment must ultimately fit the nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence, but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to objects of punishment (see *S v Ingram* 1995 (1) SACR 1 (A) at 8i-9b and *S v Samuels* 2011 (1) SACR 9 (SCA) para 9).

[22] The crime of rape is an extremely serious and prevalent offence. In *S v Chapman* 1997 (2) SACR 3 (SCA) at 5 a-b Mohamed CJ aptly described it as:

“....a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

At 5b-d he stated further:

“Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”

[23] It, therefore, can be gleaned from these remarks that even if the court finds that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than that prescribed by the Legislature, a court should take into account the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.(see *S v Malgas* 2001 (1) SACR 469 (SCA) at 482 f-g)

[24] It follows that it is incumbent upon the judiciary to always keep the said bench mark in mind when deciding on appropriate sentences for the crimes contained in the said schedule and in so doing, send a message to the community that rape will be visited with severe punishment.

[25] Having carefully considered the judgment of the court a quo on sentence, I am satisfied that it comprehensively considered and weighed all the competing interests on sentence and made findings that were well grounded in the record. I can find no error in its analysis of the evidence on sentence and I am satisfied that it took all the factors enumerated by the appellant's counsel in mitigation of sentence. In the circumstances of this case, the sentence of 20 years' imprisonment is just and proportionate to the crime, the appellant and the needs of the society, and no injustice has resulted in imposing of same.

In the result, I propose the following order:

The appeal against both conviction and sentence is dismissed and that the conviction and sentence are confirmed.

Mnguni J

Gorven J : I agree, it is so ordered.

Date of Hearing : 29 May 2013

Date of Judgment : 11 June 2013

Counsel for the Appellant : Adv. S Jasat

Instructed by : PMB Justice Centre

Counsel for the Respondent : Adv. R Sepeng

Instructed by : Director of Public Prosecutions,
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