

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN GAURENG HIGH COURT, PRETORIA)

CASE NO: **A244/2011**

In the matter between:

RAPHAEL MHLANGU

Appellant

and

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ NO.

(2) OF INTEREST TO OTHER JUDGES: ☒ YES/NO.

(3) REVISED: ☒

29/12/12

DATE

SIGNATURE

JUDGMENT

[1] The Appellant was convicted of:

Count 1: Assault with the intention to do grievous bodily harm; and

Count 2: Rape.

Appellant pleaded not guilty to both charges. On count 1 the Appellant was sentenced to 2 years' imprisonment and on count 2 to life imprisonment. The sentences are to run concurrently.

[2] The appeal is against both conviction and sentence.

[3] Regarding count 2 the complainant testified that she and the Appellant previously had a relationship. The sexual act committed

on her by the Appellant, however, took place without her consent. She testified how she was forced by the Appellant, away from a place of social gathering to the shack where he eventually raped her. On the evidence seen as a whole it is evident that the Appellant was correctly convicted of rape. However, it is also evident that the Appellant, on the particular day (being 2 August 2008) only had sexual intercourse with the complainant once and not repeatedly as found by the Magistrate.

- [4] Regarding the conviction on count 1 (assault with the intent) the facts clearly show that assault with the intent has not been proven. The complainant's evidence regarding the assault on her does not justify a conviction of intent to do grievous bodily harm: according to her the Appellant hit her with his fists and open hands and kicked her. In addition, no J88 was handed in. There accordingly exists no reasonable basis on which the Appellant could have been convicted as aforesaid.

- [5] Regarding sentence pertaining to the conviction of rape it is common cause between the legal representatives of the State and the Appellant that the court *a quo* misdirected itself by relying on Schedule 2 Part 1: multiple intercourse or grievous bodily harm had not been proven. The court should have relied on Schedule 2 Part 3.

[6] The personal circumstances of the Appellant were properly placed before the court *a quo*. The following considerations as alluded to by counsel for the Appellant are relevant:

- Appellant was already in custody for 1 year and 5 months;
- The physical condition of the complainant subsequent to the assault and rape is uncertain but not serious;
- There was a single act of sexual intercourse;
- No J88 was handed in (only a DNA profile);
- No medical evidence was presented to the court.

[7] In the result the following order is made:

A. Ad Conviction:

- Ad Count 1:

The Appellant's conviction of assault with the intention to do grievous bodily harm is set aside.

- Ad Count 2:

The Appellant's conviction of rape is confirmed.

Ad Count 1:

The Appellant is convicted of common assault.

B. Sentence:

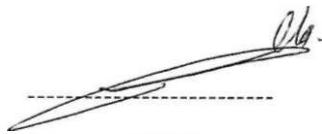
- On Count 1 (common assault) the Appellant is sentenced to 1 year~~s~~ imprisonment.

On Count 2 (rape) the Appellant is sentenced to 12 years' imprisonment antedated to 9 November 2008 and the sentence of life imprisonment is set aside.

- The sentences on Counts 1 and 2 are to run concurrently.


TJ KRUGER AJ

I agree

A handwritten signature in black ink, appearing to read 'N.M. Mavundla J', is written over a horizontal dashed line.

N.M. Mavundla J