IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A118/15

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

31/7/2015

In the matter between:

THEMBINKOSI MAHLANGU Appellant

and

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant, was charged in a regional court with the crime of rape. It was alleged in evidence that during the early morning of 24 March 2014, in his room in Daveyton, he had vaginal intercourse with the complainant three times against her will. Because there was more than one act of sexual penetration alleged, the minimum sentence applicable was life imprisonment, unless substantial and compelling circumstances were found.

2 The appellant pleaded not guilty to the charge. His defence was that

he had consensual sex with the complainant twice during the period in question. Despite his plea, the appellant was found guilty as charged. The court below found no substantial and compelling circumstances and imposed the mandatary sentence of life imprisonment.

3 A person in the position of the appellant has an automatic right of appeal and, exercising that right, the appellant appeals against both conviction and sentence.

4 The complainant was 19 years old at the time. The regional magistrate, who of course had ample opportunity to observe the complainant in the witness box, described her in her judgment as "beautiful" and a "lovely young lady". The regional magistrate described the appellant, who was 34 at the time, as an "average individual of 34, heading for middle age".

5 At the time of the incidents in issue, the complainant was in a relationship with a young man called T M. On the evening in question, the complainant and M were together at a tavern identified in the evidence as D's Tavern. The complainant did not know the name of the tavern. The complainant and M, who was called as a witness on behalf of the appellant, gave differing accounts of how they came to be at D's Tavern together. The complainant said that they had earlier that evening met at a certain street corner in Daveyton by arrangement and then been at M' s home until, at about 01hOO in

the morning, M expressed a desire to buy some beers and asked the complainant to go with him to a tavern for that purpose. The complainant said that M told her to wait outside for him, which she did. After about an hour, when M had not left the tavern. the complainant went inside, she said, to look for him. She was told that he had already left.

6 M said that they had not been to his home that evening but had come to D's Tavern after spending some time at Mojo's Tavern. He said that he had indeed left the complainant outside the tavern but only for a short time, while he bought beer, after which they stood outside for about an hour while he drank his beer. Then, M said, he left her outside the tavern while he went home to give the house keys to the person with whom he was staying, after which he returned to the tavern to find that the complainant was no longer there. He was only away, M said, for about ten minutes in all.

7 The court below found the complainant's version more probable and I agree. The complainant was unlikely to have attempted to find her way, on foot, at that time of night and alone to a place where she could safely spend the night after waiting only ten minutes for her boyfriend.

8 The complainant testified that when she found herself alone at D's Tavern, she telephoned her older sister, to whom I shall refer as B.

B's evidence was not challenged in cross- examination and was accepted by the regional magistrate who found B to be a credible and reliable witness. During the period from about 01h00 to about 03h00, there were four telephone conversations between the complainant and B. The complainant, according to the evidence of both the complainant and B, was struggling to get her bearings and find her way from D's Tavern to her sister's home, on foot. This was made more difficult for the complainant because of the lack of street signs. At about 03h00, B telephoned the complainant to find out where she was. The complainant told her she was at the Sibonelo passage and was on her way to her sister. About 15 minutes later, B telephoned her again but the complainant did not answer the call. B did not hear from the complainant again until she arrived at B's home at about 06h30 in circumstances I shall describe below.

9 What had happened after the telephone call between the complainant and B at about 03h00 was that the complainant had met up with the appellant.

10 The complainant testified that the appellant had accosted her in a passage while she was trying to find her sister's home, demanded that she go with him, slapped her in the face when she resisted and grabbed her T shirt. In the course of the struggle, the complainant said, her T shirt was torn. Then, she said, she decided to go with the complainant because she feared being further assaulted. Although a

police vehicle passed them while they were on their way to the appellant's home and she tried to signal to the police that she needed help, she was not able to do so.

11 Counsel for the appellant rightly drew attention to the fact that the complainant did not succeed in alerting the police in the vehicle to her alleged predicament. But I think one must remember that she had already been assaulted by the appellant, on her version, and could reasonably have feared, as she said she did, that if she did more to attract the attention of the police and if the police did not stop, the appellant would once more punish her with violence for her attempt to escape him.

12 Once in the complainant's home, which was a back yard shack, according to the complainant, the appellant turned the volume on the radio up high. This and the previous violence shown toward her persuaded the complainant that resistance was both futile and dangerous and she submitted to the appellant who forced her to undress and raped her three times within about an hour and a half to two hours.

13 The complainant asked the appellant to use a condom. The appellant said he did not have condoms and produced or referred to a document which he said demonstrated he was HIV negative.

14 The appellant said that he had observed the complainant while she

was drinking an alcoholic cider drink in D's Tavern and dancing. The appellant actually identified the drink as a Flying Fish. This cannot be true as it was proved beyond a reasonable doubt that the complainant did not drink alcohol at that time. The appellant gave an elaborate account of how he found her outside the tavern in the company of some men. He said he hugged her (although he had only seen her once before, had never spoken to her and did not know her name) and asked her if she felt safe in their company and offered to accompany her home, to which she agreed, saying she lived in Jhumba Street. When they were actually in Jhumba Street, the appellant testified, the complainant agreed to go with the appellant rather than go home.

15 This version was put to the complainant. The complainant testified that she lived in Extension 6, where there were no street names, and her sister lived in Kwalo. The complainant denied that she lived in Jhumba Street and her denial was not challenged.

16 The version of the appellant would therefore have it that the complainant on the spur of the moment, either at or very near her home, decided to go with and have sexual relations with this much older man whom she had never met before. Viewed in context, the appellant' s version is so absurd that it cannot be reasonably possibly true.

17 The complainant testified that after the first two acts of sexual intercourse, the appellant fell asleep and slept for about an hour. When he awoke he once again had sexual intercourse with her.

18 The appellant testified that this attractive looking, much younger woman offered him her telephone number but he refused to take it. The reason he gave in the witness box was that she smelt bad. He said that although they had exchanged names, he could not remember the complainant' s name. The regional magistrate rightly rejected this evidence as not reasonably possibly true, observing that the medical examination performed on the complainant that same day and recorded in the form J88 made no mention of any such smell (although the regional magistrate noted, there is usually such a recordal if any untoward odour is noted) and described the complainant as neatly dressed. The complainant testified that she was advised not to bath until after the examination so as not to destroy any evidence and in fact underwent the examination unbathed.

19 The evidence of the complainant was that she had taken note of the appellant's admitted address, […] Street, on her cellphone and had transferred this data to her statement to the police. She would hardly have done so if the sex had been consensual and the appellant had made it clear to her that he did not want to see her again. The appellant suggested that she laid the charge because he had rejected her. The regional magistrate rejected this improbable hypothesis as

not reasonably possibly correct and in my view she did so correctly.

20 B testified that the complainant was crying when the complainant came to her home at about 6h30 that morning. B also corroborated the complainant's unchallenged evidence that the complainant's T shirt was torn when the complainant arrived at her home. I consider this evidence to be significant corroboration for the complainant's version. There is no way that the appellant's version can accommodate this evidence and the appellant did not attempt to explain how the T shirt could have been torn.

21 Finally, on the facts, the appellant testified that at the complainant's request, he had a telephone conversation with M during the early hours of the morning and told M (to frighten him) that he was a police officer investigating a charge of rape laid by the complainant. This request was said to have been made during an interval between acts of sexual intercourse. The complainant denied having made any such request or that there had been any such telephone conversation. M, who was called on behalf of the appellant, did not mention any such telephone conversation and was not asked about the topic during his evidence. The appellant's version is this regard can safely be rejected as false.

22 The regional magistrate found the complainant to be a credible witness and rejected the version of the appellant where it conflicted

with that of the complainant as false. I find no ground to differ from that finding. The appeal against conviction must therefore fail.

23 As I have said, the court below found no substantial and compelling circumstances. Because there were multiple rapes, the appellant faced a minimum sentence under s 51(1) read with Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 unless the court below found substantial and compelling circumstances why such a sentence should not be imposed. It is beyond dispute that this was a serious and disgusting offence. A defenceless young woman, abandoned by her boyfriend, was violated several times by the appellant. The court below rightly found aggravating the decision of the appellant to rape her three times without a condom and ejaculate in her and rightly described the conduct of the appellant as callous and demonstrating no remorse.

24 But I cannot agree that there were no substantial and compelling circumstances. I find such circumstances in the following, taken together: the appellant was a first offender and the complainant suffered no physical injuries. By this last I do not mean to play down that the emotional suffering to which the regional magistrate referred in her judgment and which was demonstrated on the record. The complainant must have suffered deeply as a result of her ordeal. What I mean is that this case does not fall into what the SCA in S *v Abrahams* 2002 1 SACR implied was the category of rape for which

the ultimate sentence of life imprisonment should be imposed.

25 In addition, I get the impression that the regional magistrate gave undue weight in the sentencing process to the appellant's scandalous evidence in relation to the complainant' s alleged body odour. The regional magistrate observed as follows:

> [The complainant] is well looked after and I suppose her body odour can be that anybody can suffer from, but I almost find it offensive that you now eventually came to the conclusion that explain your irrational behaviour for not taking her contact details, that it should be explained away by suggesting that she have some offensive bodily odour which you only noticed the next morning. I feel it so unfair.

26 This is in my view a border line case in relation to substantial and compelling circumstances but I propose to give the appellant the benefit of the doubt.

27 In my view, a sentence of 26 years imprisonment (antedated to 14 August 2014, the date upon which the appellant was sentenced) would be appropriate.

28 I make the following order:

1 The appeal against conviction is dismissed and the conviction is confirmed;

2 The appeal against sentence is upheld. The sentence imposed by the court below is set aside and is substituted by a sentence of imprisonment for 26 years.

3 The sentence of 26 years imprisonment imposed by this court is antedated to 14 August 2014.

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NB Tuchten
Judge of the High Court
31 July 2015

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MA Makume
Judge of the High Court
31 July 2015