IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO: A449/2015

DATE: 4/5/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES / NO~~.

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

(3) REVISED.

04/05/2016 .....

DATE

.....

SIGNATURE

IN THE MATTER BETWEEN

THABISO MICHAEL MASITENG — First Appellant

MLINDENI JERRY SITHEBE — Second Appellant

and

THE STATE — Respondent

JUDGMENT

LEGODI J

[1] This is an appeal against the convictions and sentences imposed upon the two appellants by the Regional Court Magistrate sitting in Nigel. Both appellants were charged with robbery which carries minimum sentence of 15 years and rape carrying a minimum sentence of life imprisonment in that the complainant was raped by more than one person, interchangeably. Upon conviction, each was sentenced to 15 years and life imprisonment for robbery and rape respectively.

[2] The matter is before us on an appeal by the appellants having automatic right of appeal due to life sentence imposed on them by a regional court. The identity of the appellants, in my view, was not an issue during trial, although the state led evidence on the identification parade conducted by the police. The appellants did not dispute that they were with the complainant on the morning of the commission of the offence.

[3] They admitted that they had sexual intercourse with the complainant, but that it was with her consent. They however denied the narration of the events by the state regarding the rape charge and that they took by force from the complainant any of her belongings. In a nutshell, the evidence as whole was to the following effect:

[4] It was in the morning of 8 June 2013 at about 05H30 when the complainant met with the appellants on her way to work. It was for the first time she saw them. They walked with her for a while. At a certain corner, before where she usually takes a taxi, the two appellants pushed her into a vegetable tent. Appellant 2 took out a knife and placed it against her neck. Appellant 2 told appellant 1 to take out the firearm. She was instructed to hand over her cellular phone and she did, but then pleaded with them to give her the sim-card, which they did.

[5] She was then taken to the field. In the field, appellant 2 pulled her down, undressed her and then raped her. He then moved away and thereafter the appellant 1 raped her and they then disappeared. She stopped a vehicle which was passing-by. She made a report to the driver who tried to locate the assailants but in vain. The matter was reported to the police. She was taken to the clinic and vaginal swaps were taken from her. During trial, the appellants admitted the contents of an affidavit in terms of Section 212 of the Criminal Procedure Act and in particular that their DNA samples were found in the complainant's DNA swap extracted from her.

[6] As I said, the appellants alleged that they had sexual intercourse with the complainant's consent. The evidence was rejected by the trial court, in my view, correctly so. The complainant was abducted at about 05h30. The incident was reported at the police station before 06h00. It was suggested in cross-examination of the complainant that the appellant 1 had sexual intercourse with her consent at about 07h00 when they were allegedly caught by the appellant 2 who became very angry with them.

[7] This version was inconsistent with the evidence adduced by the appellant 1 during his evidence in court. The new version being that he had sexual intercourse with the complainant at about at 05h30. Furthermore, the version by both appellants does not coincide with the version of the driver of the motor vehicle which was passing-by. He met with the complainant that morning. She was running and crying and she made a report to him that she had been raped. He took her to the police and arrived at the police station at about 06h00.

[8] The driver was an independent witness who had nothing to gain from the case. His evidence was important in two respects: First, the appellants' version that the complainant with her consent had sexual intercourse with appellant 1 at about 07h00 cannot be correct as by that time the witness had already met with the complainant. Secondly, his observation of the complainant that she was crying and running, and that she made a report to him was consistent with a person who had just been in trouble.

[9] It appears that the appellants having been placed at the scene and connected to the commission of the rape charge by their DNA samples, resorted to a defence of consent, which as I said, was contradicted as indicated above. Remember, it was the complainant's evidence that she did not know any of the appellants before the date in question. If she really wanted to falsely implicate any of the appellants, it would have been easier and better for her to say both of them were known to her, than going through the process of two identification parades.

[10] Insofar as it relates to the robbery charge, the complainant's cell phone was found in possession of the appellant 1. Apparently, it was located to the appellant as it could be detected from the use what's up device, that the phone was active. The appellant 1 sought to give an explanation for possession of the cell phone as follows:

The complainant gave him the cell phone. She gave him the cell phone because he wanted to resolve the problem which they had. He continued in evidence as follows:

> *"I was not going to go to Dudusa anymore to go and see her in Dudusa. So, that is why she gave me her phone so that we can talk through the phone solving the problems."*

He further continued as follows in his evidence:

> *" The reason for me to take her phone, is this, because she asked me if I have a phone. I told her that I do not have a phone that is when she said that to me that she will borrow me her phone.*
>
> *She then took out her sim card, saying to me that she will communicate with me through what's up"*

[11] This evidence seems to have been tailored to coincide with the evidence of the complainant. But once the evidence of the appellants was rejected with regard to the rape charge, the evidence as quoted above ought to be rejected as well. Simply put, the complainant did not know the appellants and did not have a relationship with any of them.

[12] In other words, there would not have been a need to borrow her phone to a stranger. Her evidence was clear: A knife was put against her neck. Appellant 1 was told by appellant 2 to take out the firearm. Thereafter, her belongings, the cell phone and money were demanded and taken from her. That being so, constituted robbery with aggravating circumstances and both appellants were, in my view, correctly convicted.

[13] The appeal on both convictions must therefore fail. I now turn to the sentences of 15 years and life imprisonment imposed on the appellants. The trial court had to decide whether there were compelling and substantial circumstances justifying lesser sentences than the prescribed minimum sentences. The question at hand is whether the trial court erred in finding that there were no compelling and substantial circumstances justifying lesser sentences.

[14] Each case has to be decided on its merits. These were personal circumstances of each appellant which were placed on record in the court a quo: Appellant 1 was 32 years old at the time he was sentenced on 21 April 2015. In other words, at the time of the commission of the offences he was about 30 years old. He was not married and had one child who at the time of sentencing, was staying with its mother.

[15] As regards appellant 2, it was also placed on record that he was 31 years old and thus about 29 years old at the time of the commission of the offences. He had two children when he was sentenced on 21 April 2015 and the children were staying with his sister before his arrest.

[16] Both appellants had previous convictions. Appellant 1 was previously convicted and sentenced as follows: On 12 February 2004 he was convicted on a charge of house breaking with intent to steal and theft and was sentenced to 4 years in terms of section 276 (1) of Act 51 of 1977. The conviction was 9 years old at the time the present offences were convicted on 8 June 2013. Appellant 2 had the following previous convictions proved against him: On 25 July 2001 he was convicted of housebreaking and unlawful possession of firearm both committed on 10 June 2000. On the housebreaking charge he was sentenced to 6 years imprisonment and 3 years imprisonment on the unlawful possession of a firearm and ammunitions which was ordered to run concurrently with the 6 years imprisonment. On 20 June 2008 he was convicted on 2 counts of housebreakings and theft committed on 1 march 2008. He was sentenced to 8 years imprisonment half of which was suspended on certain conditions.

[17] On 21 February 2011 he was released on parole under supervision until 19 June 2012. The present offences were committed just a year after the expiry of the parole conditions. That in view displayed the character of the person the trial court had to deal with, particularly with regards to the robbery charge. The personal circumstances of both the appellants as set out above, in my view, as correctly found by the trial, did not cumulatively considered constitute compelling and substantial circumstances. However, counsel for the appellants sought to put the blame at the door of the trial court. The trial court committed an irregularity by not being proactive during sentencing and by not calling for probation's officer report, so the contention went around. Whilst it is correct that during sentencing, the court must not remain passive, more so where the severest

sentence is likely to be imposed, for example, life imprisonment, in the present case, I do not think that the probation officer's report would have made any difference.

[18] The circumstances under which the offences were committed are in my view, aggravating. Women, as often is the case, are victims of crimes of this nature. The complainant in the present case was a woman who had to wake up in the early hours to go to work. Despite overwhelming evidence, the appellants were steadfast about their denial of the commission of the offences. That early morning at 5h30, the appellants were on the street already. They approached the complainant, and pretended like they were concerned about her safety when they told her that it was not safe to walk alone around the corner. It was however, the appellants who threatened her safety.

[19] They dragged her into a tent, threatened her with a knife and firearm although she did not see the firearm which appellant 2 told the appellant 1 to take out. They then took her belongings. They took her out of the tent and dragged her to the field where they raped her and run away. Their denial of the commission of these offences throughout was clearly a sign of lack of remorse on their part.

[20] Consequently, the appeal against both convictions and sentences is hereby dismissed.

M F LEGODI
JUDGE OF THE HIGH COURT

D THULARE
ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT:	Adv. H STEYNBERG
INSTRUCTED BY	Legal Aid South Africa

FOR THE RESPONDENT:	Adv NETHONANDA
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Matter heard on: 25 APRIL 2016
Judgment handed down on: 4 May 2016