REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: A14/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.

DATE..... SIGNATURE:.....

In the matter between:

COSTA THABALESOKA SHAI **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The appellant was arraigned in the regional court for Phalaborwa on one count of rape read with the provisions of section 51 (1) and

Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA). He appeared before Nkuna PD and was found guilty as charged and sentenced to life imprisonment. Since life imprisonment was imposed by the regional court, the appellant enjoys an automatic right of appeal. The appellant is appealing against both conviction and sentence.

[2] The background facts are as follows. During trial the appellant has pleaded not guilty to the count of rape and his plea explanation was that of consensual sex intercourse. The complainant's version was that on 15th December 2012 around 23h00 she was walking alone from Namakgale Topville going home to Mashishimale village. As she was walking, she passed two men who greeted her but she did not respond to them. After passing the two men, when she looked back, she noticed that the two men were following her. She started running. The two men caught her in the bushes between Mashishimale and Topville. She screamed for help but she did not get any. The two men took her to the bushes of Mashishimale.

[3] In the bushes, one of the men (first man) pushed her down to the ground. When she was on the ground, the other man (second man) took off her pants and panty. After taking off her pants and panty, the first man inserted his penis into her vagina and had sexual intercourse with her without her consent. The first man did not ejaculate, but

withdrew his penis out of her vagina. The second man took off his trouser and underwear whilst the first man was holding her by her shoulders. The second man put on a condom on his penis and inserted his penis into her vagina. Thereafter the second man had sexual intercourse with her without her consent.

[4] After the second man was finished, the first man made her to lie on her stomach and put his penis into her anus and had sexual intercourse with her without her consent. After he had ejaculated both the first and second man wiped their penises with tissues and threw the tissues to the ground. Thereafter they put on their trousers and asked her whether she was going to report them to the police and she said no. After that they left her, she put on her panty and trouser.

[5] She then phoned her brother Sello who came and took her home. On arrival at home she explained to her parents what had happened to her. A criminal case was opened with SAPS and she was taken to hospital where she was examined by a doctor.

[6] The men who raped her, were unknown to her and she has never seen them before prior to the incident. However, she will be able to identify one of the perpetrators. She does not know the accused before court.

She stated that she was later phoned by a police officer who informed her that a suspect in her rape case has been arrested, and that the said suspect was the appellant. The investigating officer further told her that the appellant was linked by DNA tests results. She denied that she had consensual sex intercourse with the appellant.

[7] The second witness for the State was Lucas Mokgalabone the brother of the complainant. He corroborated the version of the complainant. He stated that he found the complainant standing on the road crying and she told him that she had been raped by two men in the bushes. She further told him that she did not know the people who have raped her.

[8] The appellant testified under oath and denied the complainant's version. He stated that prior to the 15th December 2012 the complainant was unknown to her. He stated that on 15th December 2012 at about 20h00 he was walking along the street when he found the complainant sitting on a boundary wall of a certain homestead. He asked the complainant what she was doing at night and the complainant told her that she had a fight with her boyfriend. He proposed love to her but she did not accept his proposal.

[9] The appellant decided to leave the complainant alone. As he was about to leave her, the complainant told him to accompany her and that they will talk along the way. The complainant told the appellant that she will give him what he wanted on the way even though she is in a love relationship with someone from Topville.

[10] They walked together to the direction of Mashishimale. When they reached the bushes of Mashishimale and Topville, he asked the complainant where they were going to do it. The complainant replied by telling the appellant that they can do it anywhere. The complainant then took off her jean and put it on the ground. The appellant took off his shirt and laid it on the ground. The complainant lied on his shirt and the appellant took off his trouser. He climbed on top of her and they started having consensual sex intercourse.

[11] The appellant stated he had sexual intercourse with the complainant once and that he was not in the company of anyone. He had penetrated her into her vagina and also ejaculated into her vagina. After they have finished having sex, he continued accompanying her. When they were close to Mashishimale, the appellant told the complainant that he was turning back as he was coming very far and it was late at night. The complainant told the appellant that he must accompany her up to her homestead, they are having a car and she will request her parents to

take him home. The appellant told the complainant that he will not accompany her up to her homestead since it was late at night, and further that he will not know what her parents will do to him since it was late at night. The complainant told him that her boyfriend from Topville was Zacharia Malesa. The appellant knew Zacharia. The appellant then left the complainant. As the appellant was walking to Topville, he met Zacharia who seemed to be searching for someone.

[12] The appellant stated that he was arrested during 2014. When he was arrested the police told him that the complainant had laid a charge of rape against him. The appellant denied that he had penetrated the complainant in her anus.

[13] The appellant in the case at hand has pleaded consent and dispute having had sex with the complainant more than once. It is trite that the onus rests on the State to prove all the elements of the offence of rape, including the absence of consent and intention.

[14] The first issue which this court must determine is whether the complainant had not consented to sexual intercourse with the appellant and also whether the necessary intention on the part of appellant had been proved.

[15] In terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (CLA) any person who unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant is guilty of the offence of rape.

[16] In **Otto v State**[1] the Court said:

> "In terms of s (2), consent for purposes, inter alia, of the offence created by s 3 means voluntary or uncoerced agreement. Section (3) provides that the circumstances in respect of which a complainant 'does not voluntarily or without coercion agree to an act of sexual penetration include, but are not limited to 'the situation' where there are abuse of power or authority by A to the extent his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act'."

[17] The complainant testified that after the appellant had finished raping her and had left, she phoned her brother to come and collect her. This version was corroborated by the complainant's brother who testified that he found the complainant alone and crying and she told him that she was raped by unknown men. There is no evidence that on the day in question the complainant was drunk. It is therefore impossible that if the complainant was sober, and had accepted the love proposal by the

[1] [2017] ZASCA 114 (21 September 2017 at para 15

appellant and thereafter agreed to have had consensual sexual intercourse with her, she would have done so without even asking his name. Both the complainant and the appellant met each other for the first time on the day in question and did not know each other. Common sense dictates that they would have introduced themselves to each other and if they started showing interest in each other they would have told each other their names and where they come from. Whether the information they are giving each other is correct, is immaterial. However, from the transcribed record it does not show that this was the case and was what happened. According to the appellant's version the complainant just agreed to be accompanied by a total stranger without verifying his details and on the way she agreed to have sex with him still without verifying the details of the person she was about to have sex with. This I find to be improbable.

[18] The reason for accompanying the complainant was that it was late at night and the complainant was staying far. The appellant was supposed to have accompanied the complainant home. However, after getting satisfaction, the appellant was no longer willing to accompany the complainant up to her homestead despite it being late at night and despite the complainant offering that she will talk to her parents to take the appellant to his homestead. Suddenly, the appellant was afraid of the complainant's parents, whilst before he got satisfaction he did not

think about them. This version I find not to be reasonably possibly true. If indeed it was a consensual sexual intercourse and they both have enjoyed themselves, he would not have had any problems in accompanying the complainant up to her homestead and make sure that his newly found love has arrived home safe.

[19] Even from the appellant's own version, he found the complainant late at night, on the street after she had fought with her boyfriend and that she was staying far. The appellant found the complainant stranded and vulnerable and took advantage of the situation. According to the appellant when he first met the complainant he proposed love to her and she refused. He then told the appellant that he was leaving her alone. As he was leaving, the complainant asked him to accompany her and that she will give him what she wanted on the way even though she is in a relationship with someone. They walked until they were in the bushes of two villages. They were now in the middle of nowhere and that is when he asked the complainant where they were going to do it.

[20] That shows that the complainant did not have any other alternative but to succumb to the appellant's demand. If she did not accede to the appellant's demand, she would have been left stranded in the middle of the night in the bushes, hence she told him that she will give him what he wanted even though she is in a relationship with someone. The

appellant, waited until they were in the middle of two villages, in the bushes, late at night and wanted to know where they were going to do it. The appellant knew that since they were in the bushes, late at night and between two villages, the complainant was now more vulnerable to have refused his demand. In my view, if the court was to accept the appellant's version, that shows that the complainant's was coerced by the situation she was in to accede to the appellant's demand.

[21] In **Mugride v S**[2] Erasmus AJA said:

> "The law requires further that consent be active and therefore mere submission is not sufficient. In Rex v Swiggelaar Murray AJA commented as follows: 'The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from words, it is fallacious to take the absence of resistance as proof of consent. Submission by itself is no grant of consent, and if a man intimidates a woman to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment which the woman, whilst persisting in her objection to intercourse, is afraid to display or realizes is useless."

[22] According to the appellant's version, the complainant has left her boyfriend's homestead because they fought. It was late at night and the complainant did not wish to go back to the boyfriend's homestead. She wanted to go home, but was far. There was a stranger who offers

[2] 2013 (2) SACR 111 (SCA) at para 40

assistance but at a price. The only way to arrive home safely was to give the stranger what he wanted. It was therefore useless for the complainant to continue resisting the appellant's demands if she wanted to arrive home safely. That submission, in my view, does not satisfy the requirement of active consent. The State has therefore proved that the appellant had the necessary intention to rape the complainant.

[23] Taking into consideration the evidence presented in its totality, in my view, the evidence of the appellant is false beyond reasonable doubt, and the trial court was correct in rejecting it. The trial court has correctly accepted the version of the complainant that she did not consent to have sexual intercourse with the appellant. On conviction there is nothing to fault the trial court. Therefore, on conviction, the appeal stands to fail.

[24] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. At appeal in which interference with the sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial court was

wrong, but whether it exercised its discretion properly. (See **S v Romer[3]).**

[25] The appellant was charged with rape that was falling under section 51 (1) Part I of Schedule 2 of the CLAA in that it is alleged that the complainant was raped by more than one person and more than once. The trial court in its judgment has found that the complainant was raped by more than one person. Ordinarily the trial court was compelled to impose life imprisonment unless it finds that substantial and compelling circumstances exists which justifies the deviation from the prescribed minimum sentences.

[26] The question to be determined is whether the State has managed to establish jurisdictional facts for this rape to fall under section 51 (1) of the CLAA. To determine whether jurisdictional facts have been established the issues to be determined are whether the complainant was raped by more than one person; or whether the appellant has raped the complainant more than once; or whether the complainant was below the ages of sixteen when she was raped. The third issue is not applicable in this case as there is no evidence presented that the complainant was below the ages of sixteen.

[3] 2011 (2) SACR 153 (SCA) at paras 22 and 23

[27] Dealing with the first issue, the complainant's evidence proves that she was raped by more than one person. However, it is only the appellant who was before the trial court.

[28] In **Mahlase v The State**[4] the court said:

> "The second misdirection pertained to the sentence imposed for the rape conviction. The court correctly bemoaned the fact that Ms DM was apparently raped more than once and in front of her colleagues. The learned judge however overlooked the fact that because accused 2 and 6 who were implicated by Mr Mahlangu, were not before the trial court and not yet been convicted of rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside."

[29] The case at hand is not distinguishable from the Mahlase case. The other person implicated by the complainant was not before the trial court, and no evidence was presented to show that the other person has been convicted for the rape on the complainant. Therefore, the minimum sentence under Part I Schedule 2 is not applicable to the rape which the appellant has been convicted of. The trial court has therefore

[4] [2011] ZASCA 191 (29 May 2013) at para 9

misdirected itself and the sentence of life imprisonment stand to be set aside.

[30] Turning to the second issue whether the appellant had raped the complainant more than once, the appellant was linked to this offence by the DNA found deposited in the complainant's anus. According to the complainant's evidence, the person who penetrated her first, had penetrated her in her vagina, but had withdrawn his penis before ejaculating. Thereafter she was penetrated by the second person in her vagina and that the second person had used a condom. After the second person had finished, the first person came back again, turned her and made her to lie with her stomach and thereafter penetrated her in her anus, and that is when he ejaculated.

[31] The question is whether these two acts can be regarded as constituting more than one rape. In **Tladi v The State**[5] the court said:

> "The second issue in this appeal is whether the state proved that there were two separate incidents of rape. In S v Blaauw the court said:
>
> > *'Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated acts of rape. A rapist who in the course of raping his victim withdraw his penis, positions the victim's body differently and then penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he*

[5] [2012] ZASCA 85 (31 May 2013) at para 12

had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against a tree. He was not committing another separate act of rape. Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place: (my emphasis.)"

[32] The evidence by the complainant is that she was raped by two unknown people. The first person who penetrated her in the vagina also penetrated her in the anus where he ejaculated. The second person to penetrate her in her vagina used a condom. The DNA found deposited in the complainant's anus was linked to the appellant. Therefore, the appellant is the person who had penetrated the complainant both in her vagina and anus.

[33] There is insufficient information as to what made the appellant to withdraw his penis before ejaculating and give the second person an opportunity to rape the complainant. We don't have information whether the appellant was removed or called by the second person before he

could finish or the appellant did so on his own; whether the appellant withdrew his penis as a result of it losing its erection and also the time period that lapsed before he penetrated the complainant again. All that we have is that for the first time the appellant did not ejaculate. If a rapist penetrates the victim in her vagina, and before he ejaculates withdraws his penis and penetrate her in the anus where he ejaculates, in my view, that is one continuous act, and he did not form two separate intentions.

[34] In the case at hand after the appellant had withdrawn his penis, he was interrupted by the second person who penetrated the complainant before the appellant penetrated the complainant again. The evidence of the complainant suggests that after the complainant had withdrawn his penis, the second person put a condom and raped her. Then after the second person had finished, she was turned and made to lie on her stomach where the appellant immediately penetrated her in her vagina. It does not seem that there was any waiting period or that after the appellant had withdrawn his penis for the first time, it lost its erection and had to wait for it to regain its erection again. It seems whilst the second person was busy the appellant was still having his erection, hence after the second person had finished he immediately penetrated the complainant in the anus.

[35] The evidence of the complainant suggests that the two acts by the appellant were closely linked. Even if he was interrupted by the second person, it seems the two perpetrators were just giving each other chance to penetrate the complainant in the vagina before they turned her to lie on her stomach since the other one was using a condom whilst the other was not. The evidence by the complainant does not suggest that after the second person had finished, there was a lapse of time before the appellant penetrated her in her anus. In my view, what the appellant did was a single continuing course of conduct and does not amount to two separate acts of rape. There is insufficient evidence to establish the guilt of the appellant on two separate counts of rape. That explains why the trial court did not deal with the issue whether the complainant was raped more than once by the appellant.

[36] In the light that the State has failed to establish jurisdictional facts for the trial court to impose life imprisonment, the rape which the appellant has been convicted of falls within the ambit of Part III of Schedule 2 where the prescribed sentence for a first offender is 10 years, second offender 15 years and third offender 20 years. The appellant is a first offender. The appeal on sentence stand to succeed.

[37] In the result I make the following order:

37.1 The appeal against conviction is dismissed.

37.2 The appeal against sentence is upheld.

37.3 The sentence of life imprisonment imposed by the trial court on the appellant is set aside and substituted with the following:

"The accused is sentenced to 10 years' imprisonment"

37.4 The sentence is antedated to the 24th January 2019.

MF. KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

I AGREE

M NAUDE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the Appellant : SM MAWASHA

Instructed by : LEGAL AID SA POLOKWANE

Counsel for the Respondent : V JACK

Instructed by : DPP LIMPOPO POLOKWANE

Date of hearing : 4TH SEPTEMBER 2020

Date of judgment : 21ST OCTOBER 2020