IN THE NORTH WEST HIGH COURT

MAHIKENG

CA 15/16

In the matter between:

SAMUEL MPHO MAKARINGE **APPELLANT**

And

THE STATE **RESPONDENT**

CRIMINAL APPEAL

GURA J & KGOELE J

DATE OF HEARING : 03 JUNE 2016
DATE OF JUDGMENT : 14 JULY 2016

FOR THE APPELLANT : Adv. Gonyane
FOR THE RESPONDENT : Adv. Jika

JUDGMENT

KGOELE J:

[1] The appellant, who was accused 2 in the Court *a quo,* stood trial in the Regional Court (**Court *a quo***) with two other co-accused (Accused 1 and 3) and were subsequently convicted of Rape and sentenced to Life imprisonment each.

[2] The appellant's Appeal which is accompanied by an application for condonation of the late filing of the Notice of Appeal is against both conviction and sentence. Having found that the reasons for the late filing of the Notice of Appeal as advanced by the appellant are sound, the application for condonation was granted by this Court.

[3] The evidence of the complainant is briefly as follows: On the 19th of November 2006 whilst she was at Gambler Tavern drinking juice, she was accused of stealing a cellular phone by amongst others accused no 1. Having denied that, all the accused including the appellant and other assailants assaulted her. The assault took place at a place well illuminated at the Tavern before she was pulled to a dark place. It is at this illuminated place where she saw the faces of the accused very well including that of the appellant. After the assault, the appellant together with the co-accused forcefully took her to a certain school, where all three raped her in the toilet. At that stage a certain short S (who is also named Mr M) was also present although he did not take part in raping her. The complainant described how each took a turn to rape her whilst the others were standing outside.

[4] The sister to the complainant to whom she made a report, corroborated the version of the complainant that her eye was bloodshot or red when she arrived in the morning which were later described by the doctor as a "*blue eye*". She also observed the bruises

on the arm of the complainant which was in keeping with the Doctor's observation on Form J88, *Exhibit "A"*. According to her, whilst they were still standing at the gate where the complainant found her, accused 1 appeared. The complainant pointed at him as one of the rapists. Upon reaching them, accused 1 started accusing complainant of having stolen his phone. The sister to the complainant ended up suggesting that they should all go to the police station so that he, accused 1 should lay a charge against complainant and accused 1 refused. The complainant and her sister proceeded to lay a charge of Rape at the police station. The police took them to the RDP houses where they spotted accused 1 again and he was arrested. Accused 1 revealed the names of the other accused including the appellant and they were arrested on the same day after the complainant positively identified them.

[5] K L also testified that although she did not witness the assault, she saw when complainant was pulled to the dark side of the Tavern by two male persons after accused 1 came to report to her that complainant had stolen his phone. These two males together with accused 1 ended up leaving with the complainant and never returned with her after she unsuccessfully tried to plead with them to leave her.

[6] The evidence of the police officers who effected the arrest of all the accused confirmed the version of the complainant's sister as to how they were arrested.

[7] According to the Doctor, the historical evidence given to him was that the complainant was raped by three unknown men who did not use a

condom. On the Court *a quo's* clarity seeking questions the following came out:-

> *"- The only thing that could have provided lubrication in this case is the menstruation;*
> - *Any kind of lubrication would reduce the chances of trauma;*
> - *The menstruation might have provided lubrication;*
> - *Her genitalia would not be in the same position as that of a virgin as she had sexual experience and have given birth."*

[8] The Court *a quo* also called Mr M, who is the short S mentioned by the complainant that he was at some stage present during the Rape encounter. In his testimony he indicated that some ladies accused complainant of being in possession of their cell phone and complainant told them that she knew nothing about the cell phone. Later during the night he went home with all of the accused. The complainant was amongst them. On their way home accused 1 stopped to urinate. The rest of them did not stop and they left accused 1 in the company of the complainant there. On his return, he found accused 1 still in the company of the complainant. They all went to accused 1's parental place where he parted with them. He was arrested the following day but complainant told the police that he did not participate in the rape but accused 1, the appellant and accused 3 did.

[9] Appellant together with the co-accused did not testify under oath nor call any witnesses as they were of the view that the State did not make a *prima facie* case against them. Their version can be gathered from

the following statements which were put by their legal representative to the complainant during cross examination on their behalf:

- *All accused denies having assaulted the complainant but she was assaulted by other people.*
- *'I put it to you that the reason why nobody tried to help you is because you went on your own with the three accused and S, who was taking you home'.*
- *All accused will say near the school you and accused 1 went into the toilet where you had consensual sexual intercourse with him. As for accused 2 (Appellant), accused 3 and the other person they never went into the toilet. They stayed outside until you came out.*
- *When you and accused 1 came out of the toilet accused 2(Appellant) and accused 3 went home while you and accused 1 and the other person went to accused 1's place.*

[10] Although the Court *a quo* found that there were contradictions in the State's case, it nevertheless made a finding that they were immaterial and further that there is a line of consistency which goes through the complainant's evidence that she was raped by three men in the toilet of the school. Although the Court *a quo* remarked that she was not the most perfect witness, it nevertheless concluded that she told the truth and accepted her evidence.

AD CONVICTION

[11] The grounds of Appeal relied upon by the appellant in as far as conviction is concerned were couched as follows:-

- The Honourable Court erred in finding that the State proved its case beyond reasonable doubt;
- The Trial Court erred in finding that the testimony of K L is in material respect supportive or corroborative of the complainant's testimony;
- The Court erred in not making any finding on the contradictions between the complainant and K L, E K and G K M;
- The Court further erred in not finding the contradictions of M and his own statement admitted as "Exhibit B";
- The Court misdirected itself by not considering the fact that no DNA evidence was led irrespective that swaps were taken from the complainant when Dr. Thejane examined her at Jubilee Hospital
- The Court misdirected itself by not extensively applying cautionary rules since the complainant was a single witness in the case of rape itself.

[12] It is apparent that all of the above-mentioned grounds attack the manner in which the Court *a quo* evaluated the evidence before it. I do not see any misdirection whatsoever on the part of the Court *a quo* in evaluating the evidence before it. In the first place, there was no evidence that was put before the Court *a quo* by the appellant and his co accused to gainsay what the complainant had testified about except what they said in their plea and cross-examination. The consequences of failure to give evidence were set out by the Constitutional Court in **S v Boesak 2001 (1) SACR 1 (CC)** at **paragraph 24** where the Court stated:-

> "If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused"

[13] Secondly, during the proceedings the following was not disputed by the appellant including his co-accused:-

- The appellant and his co-accused were not known to the complainant;
- The complainant saw the faces of the appellant and his co-accused at the illuminated place at the Tavern at the time she was assaulted;
- That in actual fact the people who went with the complainant to the place where the sexual intercourse took place included the appellant.

[14] There are indeed contradictions in the evidence of the State but the Court *a quo* was, in my view, alive to all the contradictions that were there contrary to what the appellant avers that it did not make a finding on the contradictions between the complainant and K, E and Mr M. As indicated in paragraph 10 above, the Court *a quo* carefully and extensively analysed these contradictions including those of the two police officers who were called and eventually found that they were not material. In as far as the complainant's evidence is concerned the Court *a quo* went to an extent of remarking that:

> "*She is not the most perfect witness but one has to bear in mind that she is a person who was subject, on her evidence, to a traumatic sustained sexual assault".*

This is an acknowledgement from the Court *a quo* that there were some short-comings / defects / contradictions in her testimony, but the Court *a quo* reached a conclusion that the truth has been told despite this. This finding cannot, in my view, be faulted. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. Sight should not be lost of the fact that the incident took place on the 19th November 2006, the complainant testified two years later in November 2008, whilst the other witnesses testified in November 2009 which is three years after the incident.

[15] The Court's witness, Mr M, contradicted almost all the evidence tendered in the Court *a quo*. He firstly wanted the Court to believe that he was with accused 1 and the complainant when he was leaving the Tavern. In cross-examination when he was confronted with his statement that he made to the police he then changed and placed the appellant and accused 3 in their company but denied the fact that he ever saw the complainant and accused 1 going to the toilet, a fact which was put to the complainant by the legal representative of the co-accused including the appellant. I agree with the submission of the respondent's Counsel and the finding of the Court *a quo* that the contradictions found in his testimony did not affect the other evidence presented by the witnesses for the state. The well-known case of **Mkohle 1990 (1) SACR 95 (A)** by **Nestadt JA** supports the finding by the Court *a quo*. It was stated in that case that:-

> "Contradictions per se do not lead to the rejection of a witness' evidence…. They may simply be indicative of an error'. In the same case the Judge

referring to a judgment in **S v Oosthuizen 1982 (3) SA 571 (T)** quoting from **576 G-H.**

> …… it is stated that not every error made by a witness affects his credibility; in each case the trier of facts has to take into account such matters as the nature of the contradictions, their number and importance and their bearing on the other parts of the witness' evidence"

[16] The complainant was steadfast that all three accused (including the appellant) raped her. There is evidence from the complainant that at the time one was busy raping her, the others would be standing outside the toilet. This evidence is somehow confirmed by the cross-examination of the appellant and his co-accused that accused 2, 3 and Short S (Mr M) waited outside when accused 1 had sexual intercourse with her. What is surprising is that the reason for accused 1 engaging in sexual intercourse with the complainant was not explained by all of the accused, including the appellant. There was no mention as to whether there was a love relationship between complainant and accused 1 or whether he proposed her love. As to when the consent to have sexual intercourse was given to accuse 1 baffles one's mind taking into consideration that accused 1 had shortly before the sexual encounter accused complainant of stealing his phone. It is furthermore highly improbable that complainant would agree to have sexual intercourse with accused 1 who has just accused her of stealing her phone and ended up assaulting her.

[17] Mr Gonyane on behalf of the appellant referred to the complainant as a single witness when it comes to the Rape encounter and submitted that the Court *a quo* should have exercised caution when evaluating her evidence. This submission loses sight of the fact that the accused, including the appellant, placed themselves at the scene during cross-

examination and at the least, confirmed sexual intercourse with only accused 1 only. The only evidence that can be treated with caution from the complainant is the one which relates to the fact that appellant also took part in raping her. But there is a ring of truth in this piece of evidence because of the following:-

- the complainant was able to describe how each of them raped her and their sequence;
- she was honest enough to tell the Court *a quo* that Short S (Mr M) did not rape her and further that although at some stage accused 3 insisted that Short S should also take part, he instead simulated the sexual intercourse with her on the floor;
- she testified that only accused 1 raped her again at the RDP house where they went after the first episode in the toilet. If she wanted to exaggerate her testimony nothing prevented her to say that appellant also raped her for the second time;
- her version that she was forcefully taken away from the Tavern by more than one person was corroborated by K.

[18] The submission by Mr Gonyane representing the appellant that crucial evidence in the form of DNA was not proved and the reason for its absence not explained when swabs were collected for DNA analysis does not assist appellant in anyway. It is not in all cases where the Court can find that sexual intercourse took place by relying on DNA test results. The evidence of the witness may be so strong that it links an accused to the offence especially like in this case where it finds support or corroboration from evidence of other witnesses.

[19] The submission by the respondent's Counsel that the gynaecological examination by the Doctor showed no injuries equally has no merit. Although the Doctor said he did not observe any trauma on the vaginal wall, he went on to say:-

> "*Because the complainant was menstruating at the time of the rape, it might have provided lubrication and further that any kind of lubrication would reduce trauma."*

[20] The conviction of the appellant must therefore stand.

AD SENTENCE

[21] Mr Gonyane on behalf of the appellant submitted that the Court *a quo* misdirected itself by finding that there are no substantial and compelling circumstances which justify the imposition of a lesser sentence than the one prescribed by the Minimum Sentence Act.

[22] The following factors were placed on record in mitigation of sentence:-

- the appellant was a first offender. This is an indication that the appellant is a candidate for rehabilitation,
- the appellant was twenty six (26) years old;
- he had one (1) minor child of four (4) months old;
- he passed Grade 11 and was self-employed as a carpenter and had a responsibility towards his minor child;
- that the intake of alcohol may have reduced the moral blameworthiness of the appellant;

- that there was no premeditation in the commission of the offence;

[23] It is trite law that the task of sentencing a convicted person primarily lies within the discretion of a Trial Court and the Court of Appeal may only interfere with the sentence if the trial Court has exercised its discretion in an unreasonably manner or the sentence is shockingly severe.

[24] Advocate Jika on behalf of the State made a concession that the Court *a quo* misdirected itself as argued by the appellant's legal representative and submitted that the sentence should be interfered with. I am of the view that this concession was correctly made.

[25] The circumstances of this Rape brought the sentencing within the purview of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 as the victim was raped by more than one person. This is a prescribed and not mandatory sentence, and the Court may impose a lesser sentence if it finds that there are substantial and compelling circumstances. Where minimum sentences are applicable, the proper approach was established by the Supreme Court of Appeal in the path-finding and seminal judgment of **S v Malgas 2001 (1) SACR 469 (SCA)**. The summary of the approach is conveniently set out at **paragraph 25** therefore, the effect of which is that the prescribed minimum sentence should ordinarily, and in the absence of weighty justification, be imposed. **Paragraph 1** of the summary says the following:-

> "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing it, it is entitled to impose a lesser sentence".

[26] The aggravating circumstances in this matter are:-

- the complainant was labelled as a thief in front of other people;
- as a result of this accusation she was assaulted by the appellant and his co-accused resulting in her sustaining injuries;
- as if this was not enough she was further gang raped by the same people in a toilet;
- At no stage did any of the accused including the appellant show signs of remorse, instead they have decided on making the complainant relive her experience in Court.

[27] This is the first time the appellant had brushes with the law. His age counts in his favour as well for rehabilitation purposes. One cannot exclude the possibility that liquor and peer pressure played a role as this incident occurred when they were all from the Tavern. All these factors taken cumulatively together with his other personal circumstances amounts in my view to substantial and compelling circumstances that warrant a lesser sentence than the one prescribed.

[28] Having said that, the crime which the appellant has committed remains serious. It remains the kind of offence the Legislature has singled out for severe punishment. It is a heinous crime especially because it was

committed by the appellant and his friends taking turns. A longer sentence of imprisonment would in my view be appropriate to deter other like-minded people and to demonstrate that it is no longer business as usual.

ORDER

[29] The following order is thus made:-

29.1 The appeal against conviction is dismissed;

29.2 The appeal against sentence is upheld;

29.3 The sentence imposed by the Court *a quo* is set aside and is substituted with the following:-

"Twenty two (22) years imprisonment"

29.4 The sentence is antedated to the 8th December 2010.

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	Legal Aid South Africa Mafikeng Justice Centre Protea Park, Industrial Site MAFIKENG
FOR THE RESPONDENT	:	Director of Public Prosecutions Mega City Complex East Gallery 3139 Sekame Road MMABATHO