IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWMN

CASE NO: CA&R388/2014
DATE HEARD: 15/04/2015
DATE DELIVERED: 5/05/2015
REPORTABLE

In the matter between:

SIVE MAXABANISO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PLASKET J

[1] The appellant was convicted in the Regional Court, Fort Beaufort of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was sentenced to 15 years imprisonment. He appeals against both conviction and sentence and does so with the leave of the court below.

[2] It is common cause that the appellant had sexual intercourse with the complainant on 6 July 2013 and that he penetrated her twice. The magistrate rejected the appellant's evidence that the sexual intercourse was consensual and accepted the

evidence of the complainant that it was not. He was correct in arriving at this conclusion and there is no challenge to it on appeal.

[3] I am satisfied that the magistrate was indeed correct in finding that the appellant raped the complainant. Because of his acceptance of the evidence of the complainant, the issues that arise in this appeal must be decided on the basis of her evidence.

[4] The issues that arise for determination are: (a) whether the appellant was adequately warned of the applicable provisions of the Criminal Law Amendment Act 105 of 1997 relating to the relevant applicable prescribed minimum sentence; (b) whether he ought to have been charged with two counts of rape, rather than one count; (c) whether the evidence establishes that he raped the complainant more than once; and (d) whether the magistrate misdirected himself in respect of the sentence he imposed.

[5] Before turning to these issues, it is necessary to set out the relevant facts.

The Facts

[6] On 6 July 2013, the complainant met the appellant, who she barely knew, in the street. They struck up a conversation and this resulted in them agreeing that the appellant would accompany the complainant and her friend to a sports bar that evening. It was agreed that the appellant and the complainant would go first to the appellant's home, and then to the complainant's home, to fetch money before proceeding to the sports bar where they would meet the complainant's friend.

[7] When they arrived at the appellant's home, he ordered two young boys who were present to leave. He locked the door from the inside (with two bent nails) and made advances to the complainant.

[8] The complainant, fearing that the appellant intended raping her, tried to delay matters. She eventually managed to open the door and escape but the appellant caught her, dragged her back into the house while he choked her, and threw her onto the bed.

[9] He locked the door, undressed the complainant and himself and proceeded to penetrate her. At some stage, he stopped, withdrew from her, left the room and went to the toilet, informing the complainant that he was not finished with her.

[10] When he returned from the toilet, he threw the complainant onto a mattress on the floor and penetrated her again. At that state, two people arrived. The complainant called for help and they managed to open the door and save the complainant from the appellant.

The Charge

[11] The charge sheet stated that the appellant was guilty of rape because, on the date in question, he unlawfully and intentionally committed 'an act of sexual penetration … by inserting his penis into the complainant's vagina without the consent of the said complainant'.

[12] Reference was made in the charge sheet to ss 51 and 52 as well as Schedule 2 of the Criminal Law Amendment Act. Section 51 refers to various minimum sentences while Schedule 2 in its various parts sets out the particular circumstances in which specific minimum sentences apply. (Section 52 was repealed by the Criminal Law (Sentencing) Amendment Act 38 of 2007 which commenced on 31 December 2007.

[13] When the charge was put to the appellant, the prosecutor added the following:
'Please take note sir that this offence is read with the provisions of section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended meaning that should a conviction follow in this matter that the State would ask the court to consider life imprisonment in this matter due to the fact that the complainant was raped more than once.'

[14] The appellant was legally represented. His legal representative entered a plea of not guilty on his behalf and stated that the appellant 'had consensual sexual intercourse with the complainant twice as they were boyfriend and girlfriend at the time'. He continued to say that he had explained the 'provisions of the Minimum Sentences Act, in particular section 51, sub-section 1 that in the event of a conviction life imprisonment may be possible and he understood it …'

[15] It was clear from the manner in which the prosecutor put the charge and from the appellant's legal representative's response that any deficiency brought about by the vagueness of the charge sheet had been cured: the appellant knew and understood that he was charged with one count of rape, although the State alleged that he penetrated the complainant twice.

[16] While it is preferable that the charge sheet should set out expressly what provision of s 51 and what aspect of Schedule 2 it is referring to for purposes of sentence, in this case there was no unfairness to the appellant despite the charge sheet's deficiency in this regard.[1]

The Charge: One count of rape or two?

[17] The appellant was charged with one count of rape but was informed that the State would possibly seek a sentence of life imprisonment, in the event of a conviction, because the complainant was penetrated more than once by him. This was clearly a reference to the provision of Part I of Schedule 2 of the Act (when read with s 51(1)) that the prescribed sentence is life imprisonment when rape is committed in circumstances 'where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice'.

[1] *S v Cunningham* 2004 (2) SACR 16 (E) at 19b-d.

[18] In *S v Kimbeley & another*,[2] Erasmus J held that this provision 'contemplates the position where the accused had been convicted of rape committed in circumstances involving multiple rapes' and that it envisaged three sets of circumstances, including where the victim was raped 'more than once by the accused'.

[19] On appeal, in *S v Kimberley & another*,[3] Zulman JA confirmed the correctness of Erasmus J's interpretation of this provision. He held:
'The "mischief" which the Legislature sought to deal with, in my view, was the situation where a woman is subjected to multiple rapes either by one person or by any "co-perpetrator or accomplice". Paragraph (a)(i) of Schedule 2 covers the situation where "the victim was raped more than once".'

[20] It was argued by Mr Renaud, who appeared for the appellant, that he was charged with one count of rape and that the State, if it wanted the sentence of life imprisonment to apply, ought to have charged him with two counts of rape.

[21] I am aware of cases in which an accused has been charged with more than one count of rape, involving the same victim. *S v M*[4] and *S v Senyolo*[5] are cases in point. In both cases, the accused had raped the same victim once on two different occasions a few months apart in the former and 15 days apart in the latter. Both accused were charged with two counts of rape and, in both, the court held that a prescribed sentence of life imprisonment applied because the accused had raped the same victim more than once. In *S v M*, Satchwell J sentenced the accused to 'one term of life imprisonment in respect of both counts one and two'.[6] In *S v Senyolo*, however, Van Eeden AJ, having found substantial and compelling circumstances to be present, set aside the sentence of life imprisonment imposed by the trial court and replaced it with a sentence of 10 years imprisonment in respect of each count.[7]

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[2] *S v Kimberley & another* 2004 (2) SACR 38 (E) para 17.
[3] *S v Kimberley & another* 2005 (2) SACR 663 (SCA) para 9.
[4] *S v M* 2007 (2) SACR 60 (W).
[5] *S v Senyolo* 2010 (2) SACR 571 (GSJ).
[6] Note 4 para 117.
[7] Note 5 para 27.3.

[22] I am not convinced that these cases, to the extent that they applied item (a)(i) of Part 1 of Schedule 2 in respect of rape when the individual acts of rape are separated by a significant period of time, are correct but it is not necessary to decide that in this judgment.

[23] I am also aware of cases in which separate acts of penetration have occurred during the course of the same incident and the accused was charged with more than one count of rape. *S v Willemse*[8] is a case in point but, in that case, the appellant had penetrated the complainant first vaginally and then anally, leading Griffiths J to conclude that, despite their proximity in time, they were 'two separate and distinct acts of rape'.[9] When he proceeded to consider sentence, however, he stated:[10]

'As regards the offence itself, as bad as it was, it is so that the two acts of rape did follow closely upon one another and there was no lengthy time lapse between them Had the appellant not proceeded to rape the complainant in her anus and had he removed and reinserted his penis into her vagina as part of a single transaction, he probably would not have been convicted of two separate acts of rape.'

Griffiths J set aside the life sentence that was imposed by the court below, taking the two convictions as one for purposes of sentence, it would appear, and replaced it with a sentence of 20 years imprisonment, again taking the two counts as one for purposes of sentence.

[24] There are occasions when a person accused of raping a victim more than once in the course of a single encounter is charged with more than one count of rape. It appears to be practice in this Division, however, to charge such an accused with one count of rape. In my view, in the normal course, that is the correct way to charge such an accused. It avoids potential difficulties highlighted by the sentences imposed in *S v M*[11] and *S v Senyolo*,[12] namely whether (in the absence of other factors dealt with in Part

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[8] *S v Willemse* 2011 (2) SACR 531 (ECG).
[9] Para 19.
[10] Para 26.
[11] Note 4.
[12] Note 5.

1 of Schedule 2) each count attracts a potential life sentence, or whether the first rape attracts a ten year minimum sentence while the second attracts a life sentence, or whether both counts have to be taken together for purposes of sentence.

[25] In my view, the legislature envisaged an accused being charged with one charge of rape if, in the course of his encounter with his victim, he penetrates her more than once. The repeated penetration of his victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is, in other words, the multiple acts of penetration that attract the life sentence, as would be the case in a so-called gang rape. One does not require item a(i) to meet the concern that when an accused rapes the same victim twice with the acts of penetration separated by, say, a week, he may be deserving of a sentence of life imprisonment (for at least the second rape): even when the prescribed minimum sentence for a rape is ten years imprisonment, courts have common law powers to impose harsher sentences, including life imprisonment, if that is called for in the circumstances.[13]

[26] In this case, it is common cause that the two acts of penetration occurred during the course of a single encounter between the appellant and the complainant, namely after he had locked both of them into his room. In similar circumstances, the Supreme Court of Appeal appears to have accepted without comment that one count of rape is competent. In *S v Mahomotso*,[14] Mpati JA (as he then was) set out the background to the matter thus:

‘The respondent was arraigned before the regional court sitting at Puthaditjhaba on two counts of rape. He was undefended. Despite his pleas of not guilty he was convicted as charged. I shall, for convenience, refer to the respondent as “the accused”. The offences were committed on 7 June 1998 and 11 August 1998 respectively, after the Criminal Law Amendment Act 105 of 1997 (the Act), which provides for minimum sentences for certain specified offences, came into effect on 1 May 1998. In convicting the accused the regional magistrate found as a fact that he (the accused) had had non-consensual sex with each of the two complainants more than once.

[13]See *S v Cock; S v Manuel* ECG 3 February 2015 (case no. CA108/2013) unreported, para 36.
[14]*S v Mahomotso* 2002 (2) SACR 435 (SCA) para 1.

In terms of s 51(1) of the Act the mandatory sentence in such circumstances is imprisonment for life, unless "substantial and compelling circumstances" exist that justify the imposition of a lesser sentence (s 51(3)(a)).'

[27] The accused in that matter had dragged the first complainant into his home, had kept her a prisoner overnight and had raped her four times. He abducted the second complainant and raped her twice.

[28] In *S v Nkomo*[15] the appellant had also been charged with one count of rape, a fact that drew no comment from the court. He, having raped the complainant once, locked her in a hotel room and went to a bar to drink. When she tried to escape, he caught her, took her back to the room and raped her four more times during the course of the night.[16]

[29] I conclude that there is no merit in the argument that the appellant's trial was unfair because he was found to have penetrated the complainant more than once but had only been charged with one count of rape.

The evidence: Was the complainant raped twice?

[30] Whether the appellant penetrated the complainant once or twice during the course of the rape is a factual issue. In *S v Blaauw*,[17] Borchers J set out the approach to determining this issue thus:

'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 (ie 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

[15] *S v Nkomo* 2007 (2) SACR 198 (SCA).
[16] *S v Vilakazi* 2009 (1) SACR 552 (SCA) is another example where an appellant had been charged with one count of rape but had penetrated his victim during one encounter more than once. Many more examples can, no doubt, be found in the law reports.
[17] *S v Blaauw* 1999 (2) SACR 295 (W) at 300c-d. See too *S v Willemse* (note 8) para 18; *S v Mavundla* 2012 (1) SACR 548 (GNP) para 8; *S v Tladi* 2013 (2) SACR 287 (SCA) para 13; *S v LM* 2015 (1) SACR 422 (ECG) para 12.

thereafter, it should, in my view, be inferred that he formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place'.

[31] In my view, the magistrate's finding that the appellant raped the complainant twice is correct. He first had sexual intercourse with her on a bed. It is not clear whether he ejaculated, but he withdrew his penis and left the room to go to the toilet. As he left he told the complainant that he had not finished with her. After going to the toilet he returned to the room, threw the complainant onto a mattress on the floor and raped her again.

[32] This was not one continuous course of conduct or, as in one of the rapes in *S v Blaauw*,[18] an interruption in an act of rape to change the position of the victim. Rather, two distinct acts of penetration occurred, in different places in the room, with the first interrupted by the appellant withdrawing from the complainant and leaving the room for a period.

Sentence

[33] As the appellant raped the complainant more than once, the prescribed sentence, in the absence of substantial and compelling circumstances, is life imprisonment.

[34] The magistrate found substantial and compelling circumstances to be present. They were the age of the appellant, the fact that he was a first offender and that the rape was 'not a worst kind of rape'. As against these factors, however, he took into account a number of aggravating factors and decided that 15 years imprisonment was an appropriate sentence.

[35] The fact that the appellant had decided to rape the complainant before he reached his home seems clear to me from him chasing the two boys away on arrival

[18]Note 18.

and him immediately locking the complainant and himself into the room, thus depriving her of her freedom of movement. When she escaped, he used force to capture her and bring her back into the room.

[36] In my view, when the personal circumstances of the appellant, the nature and seriousness of the crime and the interests of society are considered, it cannot be said that the magistrate misdirected himself as to sentence in any respect, and the sentence he imposed does not induce a sense of shock. It accordingly must stand and the appeal must fail.

Order

[37] The appeal against both conviction and sentence is dismissed.

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C. PLASKET
JUDGE OF THE HIGH COURT

I agree.

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B. SANDI
JUDGE OF THE HIGH COURT

Appearances:
For the appellant: C Renaud, instructed by the Grahamstown Justice Centre.
For the respondent: D Els, instructed by the Director of Public Prosecutions, Grahamstown.