IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER : A725/16

DATE:16 February 2018

SMANGAUSO JEFFREY NDLOVU First Appellant

SPHIWE METON MOTSOTSO Second Appellant

v

THE STATE Respondent

JUDGMENT

MABUSE J: (F Diedericks AJ concurring)

[1] This is an appeal by the appellants Smangaliso Jeffrey Ndlovu, the first appellant and Sphiwe Meton Motsotso, the second appellant, against their conviction on 29 July 2016 by the regional court magistrate and their subsequent sentences imposed on them by the court *a quo.*

[2] The appellants appeared before the regional court in Nigel where they were charged with four counts, namely:

Count 1: Kidnaping;

Count 2: Robbery with aggravating circumstances read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997;

Count 3: Rape read with the provisions of s 51(1) of the Criminal Law

Amendment Act 105 of 1997;and

Count 4: Rape read with s 51(1) of the Criminal Law Amendment Act 105 of 1997.

[3] The appellants, who enjoyed legal representation by a certain Mr. du Plessis throughout the entire trial, pleaded not guilty to all the four counts. Through the said Mr. du Plessis, both the appellants made plea-explanations in respect of each count in terms of s 115 of the Criminal Procedure Act 51 of 1977 ("the CPA"):

3.1 in respect *of* count 1, the plea-explanation tendered was that the complainant accompanied the appellant freely and voluntarily and that there was no forced deprivation of freedom;

3.2 with regard to count 2 the appellant denied that they together or individually threatened the complainant with knife or with grievous bodily harm. They further denied that they forcefully took anything from the complainant. In respect of count 2, the first appellant explained further that on 10 August 2014 the complainant, K M, gave him a Blackberry cellular phone and asked him to load music into it. She asked the first appellant to keep the said cellular phone until they would have reached their destination. The said cellular phone was found at the first appellant's place;

3.3 with regard to counts 3 and 4 the two appellants denied that they raped the complainant. They admitted, though, that both of them had sexual intercourse with the complainant but contended that the complainant had consented to such sexual intercourse.

[4] The State proceeded thereafter to hand in the J88, a medico-legal examination report by a certain Dr. Kruger. This was accepted by the court as Exhibit 'A'. It was handed in without any objection by the defence. This Exhibit 'A' was completed by the said medical doctor on 10 August 2014 during the examination of the complainant. During such examination the doctor took certain samples. The contents of the J88 were not in dispute.

[5] The next document that the State handed in was an affidavit in terms of s 212 of the CPA. It related to the DNA. This affidavit was handed in as Exhibit 'B'. The contents hereof were not in dispute. Lastly, the State handed in Exhibit 'C', a photo album of the scene of the offence by the complainant. The photographs contained in it, seven of them, were not in dispute.

[6] The charges against the appellant arose from the following circumstances. The incident in question took place on 10 August 2014 in the early hours of the morning. At a certain time before the incident that is the subject of this appeal, took place, the complainant was at a certain tavern with a friend of hers. That friend went away, leaving her at the tavern. When it was about to close she arranged with a certain M, a male person who was known to her, that when they left for home, in particular for [….] they should leave together. When he left M informed the complainant. They left the tavern. He was not alone though, but was with a group of other people. When they all came to the corner of Ratanda Town Hall, there they stopped and waited for transport that would take them to Extension 23.

[7] Matwaleni and his group of friends decided all of a sudden that they would be going to Ratanda Hostel and no longer to Extension 23. He left her behind with two friends of his. Those two friends of his were the appellants in this matter . The first appellant then said that he did not have small change. So he decided that he, the second appellant and the complainant would go to a tavern in Extension 1 where he would buy a beer so that he could be given small change. That particular tavern to which they had walked had closed. So they walked to Extension 3. There it was also closed.

[8] They then took a road that led them to Khanya Lesedi Secondary School, knowing there was no other tavern in the direction in which they were walking, she asked the appellants where they were going. The first appellant told the complainant that there was another tavern that she did not know of to which they were going. Upon that reassurance she continued walking with the appellants into that direction.

[9] At the one end of the school premises the first appellant, out of the blue, started to throttle her. He warned her not to make noise and threatened that he would kill her if she did. The second appellant assisted to drag her into the bush. She asked them not to harm her but instead she was prepared to let them have her cellular phone and money. The first appellant took her cellular phone from her while the two appellants continued dragging her into the bush. The first appellant pulled her pants down while the second appellant dragged her down. The first appellant undressed her of her panty and, having done so, undressed himself. While she was lying on the ground the first appellant asked the second appellant to pull her legs apart . The second appellant obliged. The first appellant inserted his penis into her vagina. She pleaded with the first appellant to use a condom at least because she was pregnant. The first appellant dismissed her plea and told her that she was lying.

[10] Having put his penis into her vagina, the first appellant moved up and down. At some stage he tried to kiss her but she bit him. It was after she had bitten him that the first appellant grabbed both her hands and pressed them down on the ground. When he had finished having sexual intercourse with her he withdrew his penis from inside her vagina. The second appellant then got on top of her and put his penis into her vagina. Despite the complainant warning him that she was pregnant, the second appellant did not believe her. He too had sexual intercourse with the complainant after which he withdrew his penis out of her vagina. He stood by and put on his clothes.

[11] Both appellants asked her not to lay any charges against them. She promised that she would not do so. The second appellant then told the first appellant to give the complainant her phone back but the first appellant refused. Both of them just walked away and left her in the bush. She stood up, took a piece of tissue and wiped her private parts and put the tissue in her pocket and put on her clothes.

[12] She walked to the nearest house where there was a boy who was known to her. From there she called her boyfriend who promised to come where

she was. In the meantime she explained what had happened to the people in the house.

[13] After a few minutes her boyfriend arrived at that particular house. Both of them went to the police station where she explained her experiences at the hands of the appellants to the police. She visited, in the company of the police, the scene where she was assaulted. There she found her hairpiece, her house keys and a knife. The police took her and her boyfriend home where they found her brother, T. She explained to T what had happened to her in the early hours of the morning. From her home they drove to the house of the first appellant. The first appellant jumped over the fence on seeing her and the police walking in his premises and fled. But her brother and boyfriend gave chase, caught him, and brought him back. She and the police then went to the second appellant' s house. They did not find him. From the second appellants house they drove to the police station where she laid charges against both the first and second appellants.

[14] The police took her to the hospital where she was examined on her private parts by Dr. Kruger as already admitted. While she was being examined, another police officer arrived at the said hospital with her cell phone.

[15] She explained that while the first appellant was throttling her, her head was on his chest; that while her head was in that position, the second appellant was pulling her hair as she was unwilling to move into the direction into which they were pulling her.

[16] The second State witness, one N M, told the court that in the early hours of 10 August 2014 and while he was still asleep, he heard a knock at his door. He opened the door and saw the complainant who was crying. He asked her why she was at his place so early in the morning. She told him that she had been raped by her brothers' friends. She named them. She asked him to contact her boyfriend because she did not have airtime. He too had no airtime. He managed, however, to secure airtime from someone after which he was able to call the complainant's boyfriend, who arrived later in a green BMW motor vehicle.

[17] M T, the third witness, was, at the time of this incident, a member of the

South African Police Services and stationed at Ratanda Police Station. He was on duty on 10 August 2014 when the complainant arrived at the said police station. She was in the company of her boyfriend and they were having an argument with each other.

[18] The complainant spoke to a constable Ndaba and laid a charge of rape with her. She also told constable Ndaba that she knew where one of the suspects stayed. His driver and the complainant then got into the police motor vehicle and drove to the place that the complainant would point out. It was in Extension 23, Ratanda.

[19] Upon the arrival at a certain house, the driver parked the motor vehicle. All three of them alighted from the motor vehicle and walked towards a shack in those premises. Before they could reach the shack, which was at the back of a house, Smangaliso fled. He chased him but Smangaliso jumped over the fence. He asked the family members of the complainant to assist to apprehend Smangaliso. They gave chase in their motor vehicle and managed to apprehend him. He took him from the people and locked him in the back of the police van. The complainant then told him that Smangaliso was cine of the people who raped her. He told Smangaliso that he would be arrested for rape. Smangaliso was taken to the police stat ion. He denied that the complainant's boyfriend was present when they walked into the premises where Smangaliso's shack was located. Furthermore , he denied that any person in his company had a firearm as th ey were walking to Smangaliso 's shack. Smangaliso was the first appellant.

[20] The first appellant testified but called no witnesses in support of his case. He told the court, *inter alia,* that he had sexual Intercourse with the complainant with her consent. He told the court that the complainant consented to sexual intercourse because she did all that on her own freewill; she allowed him to grab her. She pulled her tight, she went down on her knees and she held him from behind and pulled him towards her from behind. After he had had sexual intercourse with the complainant the second appellant also did so. He went home. While he was at his home,

he decided to go out to the toilet. As he got out of the house or shack, he saw a black BMW stopping at the gate. The complainant's boyfriend alighted from the said BMW . He was with other strange people. As he got out of the motor vehicle the complainant ' s boyfriend, a certain M, was carrying a firearm. When he looked at M he could see that he was going to fight him. He then fled. At the time he saw M for the first time he did not see the police officers. He was arrested by M and other people after he had fled into a certain house in the neighbourhood.

[21] The people who arrested him assaulted him and inflicted bodily injuries on him. He was injured in the left shoulder where M hit him with something that looked like a brick or a roof tile. He also hit him in the head.

[22] The second appellant testified, among others, that he aligned himself with the evidence of the first appellant. He told the court furthermore that the complainant said to him that she wanted them to enjoy and to forget about many things. He had sexual intercourse with the complainant because he was sexually aroused. He too called no witness in support of his case.

[23] After the evidence of the second appellant, both the appellants indicated that they would call no witnesses. The public prosecutor, being satisfied with the evidence of the State witnesses, was argued that the State had proved its case beyond reasonable doubt and for that reason applied for the conviction, as charged, of the appellants. On the other hand, Mr. du Plessis, for the appellants in the court *a quo,* asked the court to acquit both the appellants after arguing that there were two mutually destructive versions before the court. He had contended that the appellants should enjoy the benefit of the doubt.

[24] **COMMON CAUSE FACTORS**

As correctly pointed out by the court *a quo* in its judgment, the following factors were common cause factors between the appellants and the respondent:

24.1 that on the early hours of 10 August 2014 and in Ratanda, Heidelberg,

the complainant and the appellants were at a certain tavern;

24.2 that the complainant left the tavern on foot and that at a certain stage she was in the company of the two appellants;

24.3 that on that morning, and in the bush, the two appellants had sexual intercourse with her;

24.4 that at the time of the sexual intercourse she was in possession of a Blackberry cell phone;

24.5 that the said cell phone ultimately ended up in the possession of the first appellant;

24.6 that on 10 August 2014 the complainant w s taken to Heidelberg Hospital for medical examination where she was examined by Dr. Kruger who recorded his findings in the J88, Exhibit 'A';

24.7 that blood samples were taken from the two appellants for analysis at the forensic laboratory;

24.8 that samples were taken also from the complainant for analysis at the forensic laboratory;

24.9 that the DNA result confirmed that the appellants had sexual intercourse with her.

[25] The court *a quo* correctly pointed out that the only issue between the State and the defence was whether or not sexual intercourse between the appellants and the complainant took place by consent. There were two versions before the court, one by the complainant in which she told the court that she had been raped by the two appellants and the other by the two appellants who, having admitted sexual intercourse with the complainant, contended that such sexual intercourse took place with the complainants' consent.

[26] The court *a quo* was aware that the respondent bore the onus to prove its case beyond reasonable doubt and furthermore that the appellants bore no such onus to prove their innocence. He correctly pointed out that in the event of there being a reasonable possibility that the appellant's version was true they should be acquitted. With regard to the complainant the

court *a quo* felt beholden to the archaic rule that the cautionary rule was still applicable. In S v J 1998 (2) SA 984 (SCA) at 987G the Court had the following to say:

'The cautionary "rule" pertaining to the perceived need for Judicial caution in evaluating the evidence of the complainants in sexual cases is inherently unfair towards such complainants, promotes inequality before the law, reflects, in the main, traditional bias, notably against woman, and is profoundly unsuited to an open and democratic society based on freedom and equality. This court is called upon, in the circumstances, to declare the approach which underlies the application of this so-called rule to be invalid, and to direct that it be dispensed with forthwith." See also S v D and Another 1992(1) SACR 143 NM.

[27] The court *a quo* was aware, as enjoined by S v Van der Meyden 1999 (2) SA 71 [WLD] that the decision it arrived at in the evaluation of the evidence must be based on the entire evidence and furthermore that it was bound to consider the strengths and weaknesses of the evidence of all the witnesses.

[28] The court *a quo* was satisfied with the evidence of all the State witnesses. It remarked that they were credible, honest and truthful witnesses; that they gave their evidence in a logical, clear and concise manner. It made this finding after it had scrutinised their evidence thoroughly and in doing so found no contradictions or improbabilities in their evidence. In analysing the judgment of the court *a quo* the lapidary of Davis AJ in R v Dhlumayo and Another 1948 (2) SA 676 AD, 705 must always be borne in mind that:

"3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

6. *Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial."*

[29] In its evaluation of the probabilities, this is what the court *a quo* correctly pointed out:

"... *and then the question comes to mind, why would this intelligent lady subject her to all this humiliation of making a rape matter or saying she was raped, whereupon it served no purpose because she could have just gone home and tell some other story why she was late. It is always so convenient to say yes, she is making a false allegation because she came late at home, but why would this clearly intelligent lady go and lay down in the veld in grass, soil her clothes. Why is her hair extensions found at the place? It does not add up....*

If this was so consensual, why not go to accused 1's or 2's house."

[30] The court *a quo* found corroboration of the complainant's version in the fact that when she arrived at Nkululekho's house, she was crying. A further corroboration, it may be added, can be found in the fact that when the first appellant saw the police and the complainant arrive at his place of residence, before he could establish why they were there, he fled. This flight may indicate consciousness of guilt. Another piece of evidence that, as correctly pointed out by the court *a quo,* supports the complainant's version that she was raped was the fact that her hair piece was found at the scene when she visited it in the company of the police. This corroborates her evidence that she was pulled or dragged by her hair to the bush. Finally, if indeed the complainant had consented to having sexual intercourse with the appellants, why did they not go to have it at either the first or the second appellants' place. With regard to the cellular phone there is no reasonable explanation why she would ask the first appellant to keep it if she went to a tavern with it, had it in her possession

all the time while she was at the tavern and kept it in her possession all the time until she was dispossessed of it by the appellant. Therefore, the first appellants' version that the complainant asked him to keep the cellular phone because she was wearing tight trousers is pure lies.

[31] The court *a quo,* and in our unanimous view, quite correctly so, made adverse remarks about the evidence of the appellants. In a nutshell, it found that their evidence was false and fabricated. For that reason it rejected it. Accordingly, in respect of count 2 robbery and count 3 rape we have concluded that the first appellant was correctly convicted and that his appeal against his convictions in respect of the said counts cannot be sustained.

[32] It is the court *a quo's* conviction of the appellants on the count of kidnapping that is to us somewhat worrisome. The i1llegation against the appellant in that count, which was count 1, was that on 10 August 2014 the appellants did unlawfully and intentionally deprive the complainant of her freedom of movement by means of grabbing her and forcing her to go with them. According to the complainant the two appellants dragged her into the bush where they had sexual intercourse with her and thereafter left her. One needs to scrutinise the purpose of the said kidnapping. Kidnapping must have the intention to take away the liberty of a victim. It does not matter how long it endures but the intention must be clear. There cannot be kidnapping if the intention of such deprivation of liberty is merely to have sexual intercourse with the victim. A robber who pulls the victim from the public to a dark passage where he robs the victim does not, by pulling such victim into the passage, commit kidnapping. The interest that is protected by the kidnapping is the liberty of the victim. A fundamental human right is that of freedom, not only of a person but also of movement.

[33] Section 12 (1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") provides that:

"Every person has the right of freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause."

Accordingly, the crime of kidnapping is committed where the intention of the kidnapper is to deprive the victim of his or her freedom of movement. Now Mokgoatlheng J and Badenhorst AJ dealt with a similar set of facts in their unreported case of Dlamini *v* The State (A466/2009) [2010] ZAGP JAC 123 [3 December 2010) stated that:

"20. *The deprivation of the complainant of liberty was predicated on a continuous intent in pursuance of their criminal transaction to rape the complainant. The commandeering of the complainant from the train into the waiting room was with the continuous criminal intention of executing the rape which could not occur without depriving the complainant of her liberty in that "specific period" when the complainant was raped."*

See also S *v* Grobbelaar and Another 1966 (1) SA 507 A at page 500 G-H. In Ex Parte Minister of Justice: in re: Moseme 1936 AD 52, 57 De Villiers JA had the following to say:

"The question of splitting of charges can only arise In a case where on accused is charged, in one and the same trial, with several 'that is two or more' offences arising out of the some act or connected series of acts or transactions."

[34] In our view charging the appellants with kidnapping and rape in the circumstances of this case amounted to splitting of charges or convictions. This is so because, as we pointed out earlier, the true intention of the appellants was more to have sexual intercourse with the complainant than to deprive her of her liberty. They could not have sexual intercourse with her in the open without dragging her into the bush. The conviction of the appellants by the court *a quo* in respect of this count cannot stand. We therefore agree with counsel for the appellant. The appeal against their conviction in respect of count 1 should, in our view, be upheld.

[35] The conviction of the second appellant on the charge of robbery does not enjoy the support of evidence. While the two appellants were dragging the appellant into the bush, it was the first appellant who took her cell phone from her, according to the complainant's evidence. After they had raped the complainant, and were about to leave, the second appellant asked the

first appellant to give the complainant her phone back but the first appellant refused. In our unanimous view, the State has not proved that the second appellant committed the offence of robbery or any offence in respect of the cellular phone. He should not have been convicted of robbery.

[36] We now turn to the sentence imposed by the court *a quo* on the appellant. The starting point with regards to sentence in R v Maphumulo and Others 1920 AD 56, 57 where the Court had the following to say:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal, and we should be slow to interfere with its discretion."

This Appeal Court can only interfere with the sentence imposed by the trial court in the following circumstances as set out in R v S 1958 (3) SA 103 AD, 104:

'There are well recognised grounds on which a Court of Appeal will interfere with the sentence; where the trial Judge ,..,or the magistrate, as the case may be - has misdirect himself on the law or on the facts, or has exercised his discretion capriciously or upon a wrong principle or so unreasonable as to induce a sense of shock.... Where no such grounds exists, however the Appeal Court will not interfere merely because the Appeal Judges conceded that they themselves would not have imposed a sentence ."

[37] In *casu,* the court took into account the relevant factors in the assessment of the appropriate sentence it wanted to impose on the appellant. In our view, it weighed such factors properly before it arrived at the suitable sentence. It committed no misdirection. It was faced with a situation where a sentence in respect of count 3 was prescribed and it found, and in our view correctly so, no substantial and compelling circumstances in which case it was compelled to impose the ordained sentence. The court a quo

was satisfied upon the consideration of all the relevant factors that life imprisonment was, in the circumstances, an appropriate sentence. Referring to the rape the court a quo correctly stated that the rape was the deliberate act of savagery, an act which is too common In our country at this time. In S v Malgas 2001 (1) SACR 469 (SCA) the Court stated that:

"The specified sentences are not to be deported from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, a version imprisoning first offenders, personal doubts as to efficacy of the policy and marginal differences in personal circumstances or degrees between co-offender s are to be excluded."

[38] The court a quo kept the complainant under observation during her entire evidence. It made the observation that she was emotionally affected; that during the course of her evidence she was crying. Further that two adult males, strong of body, were capable of overpowering the complainant and dragged her into the veld where they raped her like an animal. The court described the two appellant's attack of the complainant as a deliberate act of savagery and in support of its description of the manner in which the two appellants attacked the complainant relied on the case of S v Chapman 1997 (2) SA 3 (SCA) here the court had the following to say: *"Rape is a very serious offence,- constituting as it does, a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Women in South Africa are entitled to protection. They hove a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and enjoy the peace and tranquillity of their homes, without the fear, the apprehension and insecurity, which constantly diminish the quality and enjoyment of their lives."*

He continued and quoted the following paragraph:

“The courts are under a duty to send a clear message to the accused, in the present case, to other potential rapists and to the community that the

courts are determined to protect the quality, dignity and freedom of all women and they will show no mercy, to those, who seek to invade those rights."

[39] We have unanimously reached the conclusion that the appeal against sentence should succeed partly. In the result we make the following order:

1. The appellants' appeal against conviction in respect of count 1, and so is the sentence in respect of that count, is hereby upheld.
2. The conviction of both appellants in respect of count 1 is hereby set aside and in its place is substituted the following:

   "Accused 1 and 2 are hereby found not guilty and acquitted in respect of count 1."
3. In respect of count 2 the conviction of the first appellant is hereby upheld.
4. The second appellant's appeal against his conviction in respect of count 2 is hereby set aside and in its pl;1ce is substituted the following:

   "Accused 2 is found not guilty and acquitted in respect of count 2."
5. The sentence imposed by the court a quo on the second appellant in respect of count 2 is hereby set aside.
6. The appeal of the appellants against their conviction in respect of count 3 is hereby dismissed.

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PM MABUSE

JUDGE OF THE HIGH COURT

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F DIEDERICKS

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:	*Adv. LA van Wyk*
Instructed by:	*Pretoria Justice Centre (Legal Aid Board)*
Counsel for the respondent:	*Adv. JP van der Westhuysen*
Instructed by:	*Director of Public Prosecutions*
Date heard:	*12 February 2018*
Date of Judgment:	*16 February 2018*