THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 895/12

REPORTABLE

In the matter between:

NELSON MPHATHALATSE TLADI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tladi v The State* (895/12) [2012] ZASCA 85 (31 May 2013)

Coram: Maya, Tshiqi, Pillay JJA, Saldulker and Mbha AJJA

Heard: 23 May 2013

Delivered: 31 May 2013

Summary: Criminal law – rape – assessment of evidence – whether two separate acts of rape proved – sentence – prescribed minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 read with Part III of Schedule 2.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Pretorius J and Hiemstra AJ, sitting as court of appeal):

1 The appeal against the conviction on count 1 is dismissed.

2 The appeal against the conviction on count 2 is upheld and the conviction is set aside.

3 The appeal against the sentence of life imprisonment is upheld. The sentence is set aside and replaced with the following:

'The accused is sentenced to 20 years' imprisonment'.

JUDGMENT

SALDULKER AJA (MAYA, TSHIQI AND PILLAY JJA AND MBHA AJA, CONCURRING):

[1] The appellant, Mr Nelson Mphathalatse Tladi, was charged in the Thabamoopo Regional Court, Limpopo, on two counts of rape. He pleaded not guilty and tendered a plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA). In his plea, he admitted having sexual intercourse with the complainant but pleaded that it was consensual. He was convicted on both counts and sentenced to life imprisonment. On 3 February 2011, an appeal against his convictions and sentence was dismissed by the North Gauteng High Court, Pretoria. He now appeals against his convictions and sentence with the leave of the high court.

[2] The state led the evidence of the complainant and that of an independent witness, Ms Mpho Koma. A J88 (a medical report completed by an authorised medical practitioner) together with a DNA report were also submitted into evidence.

[3] The version of the complainant was as follows: Around the time of the rape she was involved in an extra-marital relationship with the appellant's younger brother Michael. On 15 January 2005, she was confronted by Michael's wife, who then confiscated her hand bag and Michael's cellular phone. Michael then gave the complainant the appellant's contact numbers to call him and arrange to retrieve her hand bag. On the day of the incident she called the number. Believing that she was talking to Michael, she made arrangements to meet him at the appellant's room which was in a hostel. Upon her arrival there around 15h00, she entered the room and sat, waiting for Michael to arrive. A while later the appellant entered and informed her that Michael had told him to check whether she had arrived. He assured her that Michael was on his way to meet her.

[4] According to her, the appellant was restless, going in and out of the room several times. When it became late he offered to go and buy her food, and left the room. However, when he returned, he had no food with him. A while later, he left the room again, and returned very late. The appellant then informed her that he was going to sleep at his wife's place and that she could sleep in his room. When he left, she undressed and went to sleep on a sponge in the room. The door was not locked.

[5] Whilst she was sleeping, the appellant returned to the room and locked the door. He began to fondle her and told her that she will get used to him 'in a bad way'. He then throttled her and attempted to stab her on her stomach with a pair of scissors in an effort to scare her. She stood up and tried to ward him off. He

overpowered her and she fell back onto the sponge. He then unzipped his trousers, removed her panty and had sexual intercourse with her twice without her consent. She screamed for help. Thereafter, the appellant left, informing her that he was going to arrange transport to take her home. Upon his departure, the complainant ran out of the room with her trousers in her hand, crying for help. She ran to the other rooms where she found two women, Ms Koma and Ms Lekolwane, who helped her and gave her refuge until the next morning. On the following day, she went to the hospital and the police station where she reported the rape.

[6] She stated that it was difficult for her to speak as the appellant had throttled her. Her face was swollen and she had a scar on her cheek from being bitten by the appellant. Although he stabbed her with the scissors she was not seriously injured and the injuries were not visible.

[7] Ms Koma testified that she was asleep in her room, in the same hostel where the rape occurred, when she heard the voice of a female person screaming for help. The screams were coming from a room in the left block of the hostel. She then walked to Ms Lekolwane's room next door, and they both sat together for a while listening to the screams and the pleas for help. The screams subsided but did not abate. They were afraid to go out and investigate. She went back to her room. After twenty minutes the screams got louder. She then heard that the screams were no longer coming from a room but from the passage. She peeped through the window and saw a person next to Ms Lekolwane's door. Ms Lekolwane always slept with her lights on. She went out to investigate. The complainant was crying and she was clad only in her panties which were turned upside-down and looked 'like it had been dragged'. Ms Koma and Ms Lekolwane took her inside the latter's room. The complainant, who had a scratch on her abdomen and appeared 'a bit messed up'informed them that she had been raped, and pointed out the room where the rape had taken place. She told them that she

had been raped by a person who had deceived her into believing that she was going to meet her boyfriend in that room.

[8] The appellant testified on his own account. He also called his co-worker Ms Mahlare to testify as his witness. He stated that he had met the complainant on three occasions. On the first occasion the complainant visited him at his workplace, accompanied by her friend. She professed her love for him. On the second occasion, she came to his room, and he refused to have sexual intercourse with her because she was having a menstrual period. On the third occasion, the fateful day, the complainant called him informing him that she was on her way to visit him. At around 22h00 when he arrived at the hostel, he found the complainant waiting for him in his room. She was drinking liquor which belonged to his wife. They argued over the liquor that she had imbibed. In an attempt to take the liquor away from her, he twisted her hand. During that struggle she screamed. The appellant then suggested to her that because she had drunk his wife's liquor, she should have sexual intercourse with him. The complainant agreed and they then had sexual intercourse. He then became concerned that his wife would return and discover the complainant in his room. He left the room on the pretext that he was going to arrange transport for her, and went to his parents' home where he spent the rest of the night.

[9] Ms Mahlare merely stated that the complainant had indeed visited their work place, not to see the appellant as he suggested, but Michael, who worked at the same place.

[10] The first issue in this appeal is whether the sexual intercourse was consensual. In my view, the trial court correctly accepted the evidence of the complainant that she did not consent to the sexual intercourse. Although she was a single witness regarding the rape, she gave her testimony in a clear and coherent

manner. She was further materially corroborated by Ms Koma, an independent witness who knew neither of the parties and thus had no motive to lie or favour the complainant. Ms Koma's observations tie in with those made by the medical doctor who examined the complainant twenty one hours later and found her to be traumatised. Ms Koma's evidence also confirms the complainant's version in another respect. She told Ms Koma from the onset, in her traumatised state, that the appellant had deceived her into thinking that she was going to meet her boyfriend Michael. The apparent contradiction between her description of the injuries she sustained (which she said were not that visible) and the observations of Ms Koma and the doctor, as recorded in the J88, as strenuously contended for by counsel for the appellant pales into insignificance when viewed in proper context. And any inference that the independent witness conspired with the complainant to fake the trauma of her rape which we would have to draw to reject Ms Koma's evidence, is farfetched and must be rejected.

[11] I have found the appellant's version inherently improbable for the following reasons: He presented conflicting versions to the court – it was put to the complainant that the appellant on the day in question finished work at 17h00 and accompanied her to his room where they had consensual sexual intercourse and he then left to go to his wife's place; when he testified he stated that after finishing his work, he arrived at his room at about 22h00 and met the complainant there; he had consensual intercourse with her after the fight over his wife's liquor and then he left for his parents' place where he slept because he was afraid that his wife will find him there with the complainant, yet he left the complainant in his room asleep in his bed. His evidence that the complainant was pursuing him was not supported by his own witness Ms Mahlare, who, as stated above, testified that the complainant had gone to the work place to visit Michael and not the appellant. The appellant's version cannot be accepted as reasonably possibly true in view of these inherent improbabilities and the trial court correctly rejected his

version that there was consensual sexual intercourse.

[12] The second issue in this appeal is whether the state proved that there were two separate incidents of rape. In *S v Blaauw*[1] the court said:

'Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraw his penis, positions the victim's body differently and then again 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 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 the 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.)

[13] The trial court placed much store on Ms Koma's evidence and interpreted it as suggesting that there were two distinct screaming bouts. This is clearly a misdirection. Ms Koma testified that the screams were sustained, fading a little but did not abate. There is no evidence from the complainant as to how the appellant raped her for the second time. The complainant's evidence does not suggest that there was an interruption[2] in the sexual intercourse to constitute two separate acts of sexual intercourse and, therefore, two separate acts of rape. The complainant's evidence suggests that the sexual acts were closely linked and amount to a single continuing course of conduct. There is no suggestion in her evidence that there was any appreciable length of time between the acts of rape to constitute two separate offences. The evidence against the appellant is therefore

[1] *S* v *Blaauw* 1999 (2) SACR 295 (W) at 300 a-g.
[2] *S v Mavundla* 2012 (1) SACR 548 (GNP) and *S v Willemse* 2011 (2) SACR 531 (ECG).

limited and is insufficient to establish his guilt on two separate counts of rape. The trial court should have analysed the state's evidence and should have concluded that only one act of rape had been proved beyond a reasonable doubt. Counsel for the state was constrained to concede that no evidence was presented in the trial court to sustain a conviction on the second count. Consequently there was no basis for the conviction on the second count of rape. And it falls to be set aside.

[14] Regarding sentence, it appears that the trial court took into account the fact that the appellant had been convicted of two counts of rape and formed the view that it had to impose the minimum sentence prescribed in s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) namely life imprisonment. In that regard, the court erred.

[15] In the light of the appellant being convicted of only one count of rape which falls within the ambit of Part III of Schedule 2, the prescribed minimum sentence for an offender with two previous convictions is a period of twenty years' imprisonment. Counsel for the appellant could not advance any argument that there were substantial and compelling circumstances that warrant a deviation from that sentence.

[16] In the result, the following order is made:

1 The appeal against the conviction on count 1 is dismissed.

2 The appeal against the conviction on count 2 is upheld and the conviction is set aside.

3 The appeal against the sentence of life imprisonment is upheld. The sentence is set aside and replaced with the following:

'The accused is sentenced to 20 years' imprisonment'.

H SALDULKER
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant: Ms Le Roux

Pretoria Justice Centre, Pretoria
Bloemfontein Justice Centre

For Respondent: Mr P T Nkuna
Director of Public Prosecutions, Pretoria
Director of Public Prosecutions, Bloemfontein