



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED

____15/2/2018_____
DATE SIGNATURE

CASE NUMBER :A252/2017

In the matter between:

FLOYD THEMBINKOSI MBATHA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] The Appellant was arraigned in the Regional Court, sitting in Roodepoort on three counts. Count one and two are charges of rape in contravention of section 3 of Act 31

of 2007, read with section 51 (1) of Act 105 of 1997. Count 3 is a charge of robbery with aggravating circumstances, read with section 51 (2) of Act 105 of 1997.

- [2] The Appellant was convicted on count 1 and acquitted on counts 2 and 3. He was sentenced to life imprisonment.
- [3] The appeal is in respect to conviction and sentence.
- [4] The Appellant was legally represented.

AD CONVICTION

- [5] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.
- [6] In considering the judgment of the Court *a quo*, this Court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.¹
- [7] Counsel for the Appellant argued that identity was in dispute and that the complainant on count 1 would not have been able to clearly identify the perpetrators. Counsel contended further in his heads of argument the following;
 - i. that the evidence of the other witnesses who implicate the Appellant is premised on the fact that the Appellant was arrested at the victim's residence.
 - ii. that the Appellant had an ample opportunity to run away prior to the vehicle of Mr Mangana stopping and would not have exposed himself to the risk of being arrested if he was the perpetrator and the victim knew him.
 - iii. that none of the witnesses, including Precious Nkosi could place the Appellant at the scene of the crime. Precious Nkosi also never mentioned to the police in her statement that she knew the Appellant prior to this incident.

¹ See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

[8] The version of the Appellant is that he was on his way home when he noticed a group of people running from the trenches. Upon investigation he found the victim on count 1 who reported that she had been raped by a group of male persons. He helped the victim out of the trenches and walked her home. On the way home the victim started to behave strangely and he tussled with her in order to restrain her.

[9] The Appellant's version was correctly rejected by the court *a quo*, as there would be no reason for the complainant on count 1 to falsely incriminate this Appellant. In addition the contention that the complainant on count 1 was unable to identify the other perpetrators and the Appellant himself is unfounded for the following reasons;

1. The complainant on count 1 stated that there were streetlights which allowed her to see the face of the Appellant, when he took off her T-shirt which was covering her face.² The complainant on count 1 also testified that even though she could not see the Appellant's face in the trench, she was able to see him when she got out of the trench and while they were walking.³ The complainant on count 1 says she saw the Appellant, as he was the one who raped her last, and who pulled her towards the Ebumnandini taxi rank. She stated she did not know the Appellant prior to this incident, so there is no reason for her to falsely implicate him.
2. The fact that there was sufficient lighting was confirmed by the witness C. M., who stated that the area where they were made to lie down was bright,⁴ as there was light from the opposite house.⁵ This witness was adamant that it was the Appellant who had his foot on her back.⁶
3. The witness K. M. also states that there was sufficient lighting from a street light, and she too was adamant that the Appellant was at the scene of the offence.⁷
4. The witness S. M. knew the Appellant as it was his cousin and he referred to him by the name of "Semela". There would be no reason for him to falsely incriminate the Appellant.
5. Precious Nkosi also stated that she was adamant it was the Appellant at the scene, as she was face to face with the Appellant and saw his light complexion and dreadlocks.⁸ She had 5 minutes to see his face, which was an arms length away

² See page 38 of the transcript line 17-18

³ See page 46 of the transcript line 1

⁴ See page 227 of the transcript line 5

⁵ See page 228 of the transcript line 3-4

⁶ See page 229 of the transcript line 20

⁷ See page 264 of the transcript line 7-9 and page 235 line 15-16

⁸ See page 307 of the transcript line 1-3

from her. She stated that she knew the Appellant by the names “Smether” and Thembinkosi. They used to attend the same school for two years. She stated that although it was dark she was sure it was the Appellant.⁹ This witness stated that even though her statement does not state that she saw the Appellant at the scene, she is adamant she did tell the police he was at the scene.¹⁰

[10] The version of the Appellant that he was trying to help the complainant on count 1 was correctly rejected by the court *a quo* for the following reasons;

1. The complainant on count 1 stated that the Appellant throttled her whilst pulling her to the taxi rank. If according to the Appellants’ version he was trying to help the complainant, there would be no reason for him to throttle her whilst dragging her to Ebumnandini taxi rank instead of her residential address. In addition, there would be no reason for the Appellant to be seen grabbing the complainant on count 1. The Appellant in his own version even admits that when he touched her to help her, she refused and she cried out loud.¹¹ These are not the actions of a complainant who is feeling secure, but rather of a victim who is traumatised.
2. The witness S. M. saw the complainant on count 1 and the Appellant fighting. The Appellant was busy pulling and assaulting her ¹² and he was also kicking her.¹³ Once again, these are not the actions of someone that is being helped, but rather of someone who is being attacked.
3. The complainant also told S. M. that the Appellant was pulling her to his shack by force¹⁴ and that the Appellant had raped her.

[11] The version of the Appellant that the complainant on count 1 was his girlfriend was correctly rejected by the court *a quo* for the following reasons;

1. If the Appellant was the complainant’s boyfriend, he would know where she lived. S. M. states the Appellant informed him that the complainant on count 1 stayed in Kgagiso, yet the complainant on count 1’s evidence is that she resided in Phase Five. It is clear the Appellant had no idea where the complainant on count 1 lived.

⁹ See page 312 of the transcript line 17-19

¹⁰ See page 344 of the transcript line 5-7

¹¹ See page 422 of the transcript line 7-8

¹² See page 124 of the transcript line 3

¹³ See page 124 of the transcript line 7-9

¹⁴ See page 126 of the transcript line 8-10

The Appellant also never repeated that he was the complainant's boyfriend when they got to the first complainant's house.¹⁵

- [12] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court *a quo*'s factual findings. I can find no misdirection which warrants this Court disturbing the findings of fact or credibility that were made by the court *a quo*. The State proved the guilt of the Appellant beyond reasonable doubt, and the Court *a quo* correctly rejected the version of the Appellant as not being reasonably possibly true.

AD SENTENCE

- [13] It is trite that in an appeal against sentence, the Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.
- [14] A sentence imposed by a lower court should only be altered if;
- i. An irregularity took place during the trial or sentencing stage.
 - ii. The trial court misdirected itself in respect to the imposition of the sentence.
 - iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.
- [15] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.
- [16] As was stated in the decision of *S v Malgas* 2001 (1) SACR 496 SCA;
- "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court."

¹⁵ See page 131 of the transcript line 18-22

- [17] In *S v Salzwedel* and other 1999 (2) SACR 586 (SCA) at 588a-b, the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.
- [18] The following aggravating factors are present;
- i. The Appellant maintained his innocence and showed no signs of remorse.
 - ii. The evidence indicates that there was a measure of premeditation in the commission of the offence as it appears the Appellant was part of a group who had decided to rape the complainant on count 1.
- [19] The personal circumstances of the Appellant are the following;
- i. He is 25 years old, single and has a 2 year old child which is cared for by his mother.
 - ii. The Appellant lived with his mother and siblings prior to his arrest.
 - iii. The Appellant has a grade 8 level of education and was self-employed prior to the arrest and was earning R4000-00 per month
 - iv. The Appellant has no previous convictions.
- [20] All these factors must be taken into consideration in determining whether the sentence imposed by the court *a quo* is appropriate.
- [21] There were no substantial and compelling circumstances alluded to by the Appellant's Counsel in his heads of argument or in his address before court.
- [22] The offence for which the Appellant has been found guilty is a serious offence. Section 51 (2) (a) (i) of the Criminal law Amendment Act 105 of 1997 dictates that in an instance where the crime of rape was committed by a gang, the accused shall be sentenced to life imprisonment.
- [23] As stated by the learned Marais JA in the case of *S v Malgas* 2001 (1) SACR 469 SCA, paragraph I;

“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 that sentence, it is entitled to impose a lesser sentence.”

- [24] There are no mitigating factors alluded to by the Appellant’s Counsel
- [25] This Court comes to the conclusion that the crime committed by the Appellant is so severe that a long term of incarceration cannot be avoided.
- [26] In the premises, it cannot be said that the sentence imposed is disturbingly inappropriate. I find that the court *a quo* correctly found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed sentence.
- [27] This Court finds no misdirection on the part of the Court *a quo*. The sentence imposed does not induce a sense of shock and neither is it out of proportion to the gravity of the offence.
- [28] In the premises I make the following order;

The appeal in respect to conviction and sentence is dismissed.

D DOSIO
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

N.P.MALI
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Appellant : Adv. V.J DHLOMO
On behalf of the Respondent : Adv. F. MOHAMED
Instructed by : Director of Public Prosecutions
Cnr Kruis and Pritchard Street,
Johannesburg

Date Heard : 6 February 2018
Handed down Judgment : 15 February 2018