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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR 267/2018

In the matter between:

JABULANI ALFRED KHAMBULE

APPELLANT

Vs

THE STATE

RESPONDENT

ORDER

1. The appeal against conviction is upheld
2. The conviction and sentence is set aside.
3. The verdict of the Regional Magistrate is replaced with the following verdict:
'Not Guilty and Discharged on both charges.'

APPEAL JUDGMENT

Mngadi J

[1] The appellant appeals against conviction and sentence. The Regional Magistrate after a hearing evidence convicted the appellant for one (1) count of rape and for one (1) count of robbery with aggravating circumstances. The court sentenced the appellant to life imprisonment for rape and to fifteen (15) years imprisonment for robbery with aggravating circumstances.

[2] The charges against the appellant are based on an incident which took place on 14 April 2013 when the complainant, K [...] L [...], was accosted, raped and robbed by two assailants. The appellant after his arrest first appeared in court on 24 January 2014, he was, after the trial, convicted and sentenced on 20 March 2018. The sentence of life imprisonment, in terms of the Judicial Matters Amendment Act 42 of 2013, ss 10 & 11 read with s 43(2) grants to the appellant an automatic right of appeal against both conviction and sentence.

[3] On 16 March 2018 through Legal Aid South Africa, Newcastle, the appellant filed with the clerk of court Madadeni a notice of appeal appealing against conviction and sentence on the charge of rape. The registrar of this court after receipt of the appeal record of the trial, set the appeal down for hearing on 8 March 2019. On 18 February 2019, State counsel advised the Judges' Registrar that the appeal record appeared incomplete. On 15 February 2019, Van Zyl J advised the parties that there was no leave to appeal granted in respect of the charge of robbery with aggravating circumstances. In addition, on 19 February 2019 Van Zyl J advised the parties that the appeal record was incomplete, in particular, of the missing parts of the evidence, namely; portion of the appellant's evidence in chief, entire evidence of Dr Staviska, and that the reconstructed evidence of constable Mthimkhulu was out of sequence. On 19 February 2019 appellant's counsel advised Van Zyl J that the appellant has instructed Legal Aid South Africa to move an application for leave to appeal against conviction on the charge of robbery with aggravating circumstances. On 8 March 2019, Van Zyl and Mbatha JJ granted an order for reconstruction of the record in the usual terms.

[4] On 13 February 2020 the court manager of Madadeni Magistrate's Court advised the registrar that there were six appeals (including that of the appellant) outstanding for reconstruction of the record by the Regional Magistrate (Ms Lubuzo) who had passed on. On 19 February 2020 the registrar conveyed the problem to the Acting Regional Court President. The Acting Regional Court President advised that the responsible regional magistrate passed away in 2019 and that no one else is able to reconstruct the missing evidence but enquires may be made to a National Director of Regional Court Efficiency Services for an attempt to retrieve the record from the main frame of the server. On 30 September 2022 the registrar set the appeal down for hearing on 17 March 2023. The stamps on the appeal record serving before us show that on 28 September 2022 it was stamped by the Clerk of Court : Madadeni Court and on 30 September 2022 by the registrar of this court.

[5] On 2 March 2023, after the appeal as set down was allocated to us, we received a joint notice from both counsel. Counsel in the joint notice advised us that the appeal record transcript is still defective as it was in March 2019 and it requires reconstruction. The notice proposed that the appeal be adjourned *sine die*, and the record be referred to the clerk of court for the reconstruction. We responded by advising counsel that a request for postponement of the appeal for proper reconstruction of the record is not granted, the appeal shall proceed as scheduled.

[6] It is clear from the above that the defects in the record were pointed out in February 2019 and the reconstruction order was made on 8 March 2019. Similarly, the need for leave to appeal in respect of the charge of robbery with aggravating circumstances was raised with counsel in February 2019. The communication indicates that the regional magistrate who conducted the trial passed away late in 2019 and that no one would attend to the reconstruction of the record. From February 2019 up to February 2023 no leave to appeal application was done and no reasons furnished for the failure to do so. The request on 2 March 2023 to postpone the appeal did not provide any grounds to indicate that the reconstruction and the leave to appeal not done for a period of three (3) years could now be done. Both counsel during the hearing of

the appeal could not furnish any reasons of whether the reconstruction of the record was now possible, and if so, why it was not done. In addition, the appellant's counsel could not give any reasons for the failure to do the application for leave to appeal relating to the conviction on the charge of robbery with aggravating circumstances. In my view, the matter has reached a stage to be dealt with despite the incomplete record and leave to appeal not done. In my view, the defects in the appeal record are not fatal to the hearing of the appeal. There was no dispute relating to the medical evidence and the medical examination report (J88) was available and it formed part of the record. The appellant's defence was mistaken identity. His version was put to the state witnesses and it is summarised in the regional magistrate's judgment. The record is not inadequate for a proper consideration of an appeal. See *S v Chabedi* 2005 (1) SACR 415 (SCA) at para[5].

[7] The appellant, as stated above, was charged with and convicted of rape and robbery with aggravating circumstances by the regional magistrate and he was sentenced to life imprisonment for rape and to fifteen (15) years imprisonment for robbery with aggravating circumstances.

[8] The appellant was legally represented during the trial. The charges were put to the appellant and he pleaded not guilty to the charges. His legal representative disclosed the basis of defence as denial of all the allegations and stated that it was a case of mistaken identity. The regional magistrate after hearing evidence convicted the appellant as charged and sentenced him accordingly. In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e it was reiterated that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong

[9] The state lead the evidence from K [...] P [...] L [...], the complainant. She testified that in April 2013 she stayed with her husband and their two children at Section 7 in Madadeni. On 14 April 2013 at about 18h30 she was on her way to her home. She was walking on foot from Section 3 in Madadeni, after she had disembarked from a taxi.

She walked through a playground where there were people taking down a marque close to her home. She noticed two boys walking behind her. She walked fast. One of the two boys said 'don't be afraid neighbour.' One of them was carrying a builders' steel bar square. He is the one who said 'don't be afraid neighbour.' He then placed the square on her neck in front pulling it back strangling her from the back. He told her that if she screams or do anything she would die. He strangled her with the square until she fell down. As she fell she had a cell phone in her hand. The other boy took the cell phone from her and he held her hands above her head. They asked her for money. She took the money from her chest pocket and gave it to the boy who held her hands. He took the money and he said to the other one they must leave, but the one with the square said they cannot leave, he has been lusting for her for a long time. The one with the square was the appellant. The appellant then removed her tights and panties whilst his companion continued holding her hands. She was still on the ground lying facing up. He then got on top of her after he had removed his jeans. He tried to insert his penis into her vagina but he could not because he had no erection. He then said he could not get aroused, he then called his companion who was still holding her. The appellant then held her, his companion removed his pants. He got on top of her. He inserted his penis into her vagina raping her until he finished.

[10] The complainant testified that the appellant's companion after he finished raping her held her and the appellant got on to her and he raped her until he finished. When the appellant's companion saw that she was looking at the appellant's face, he hit her on her face with a fist. Her cell phone in her breast switched on. The appellant said she was making a fool out of them, he took the cell phone. The appellant continued raping her until he finished. She asked the appellant to give her the sim cards of the cell phone. He agreed, and he said as he got up he has been lusting for her for too long.

[11] She testified that she got up and she opened a gate to her home. She got into the house and she switched on the lights. She went to her neighbour where she had left the children. She phoned her husband and she told him what had befallen her. He arrived later and other members of the community joined them in looking around for the

assailants but they did not find them. They met a police officer. She described the assailants to the police but the assailants were not found.

[12] The complainant testified that she had not initially recognised the appellant, she recognised him when he got on top of her. He was a person she knew by sight. She had seen him in the area. She with her cousin met him in the streets and they would greet each other. He referred to them as neighbours. She did not know his name and she did not know where he lived.

[13] She testified that the appellant was wearing a blue top of a worker's gear and a faded blue jean. She did not see what he was wearing on his feet. He spoke with a stutter. She did not see what the appellant's companion was wearing or how he looked like except that he was tall. She would not be able to recognise him. She testified that at the spot where she was attacked by the appellant and his companion it was dark but not too dark. There was a street light about 40 metres away providing light. No light came from her house. The complainant testified that in the neck area she sustained bruises, as well as on her upper arms and shoulders because of being held and strangled with a square.

[14] The complainant testified that on 19 October 2013 she walked from her home to Shoprite. She walked through a sports field. She then saw the appellant he was a bit far from her standing at a certain yard and talking to another person. She had not seen him since the day of the incident. She went back to her home and she phoned the police. Around 22h00, the police arrived and they took her to the place where she had seen the appellant. The police knocked and they came out with the appellant. She identified him to the police.

[15] The complainant testified that when she saw the appellant in October 2013 (after about five (5) months), she correctly identified him. His face was always in her mind and she wanted to ensure that he goes to jail for what he did. The complainant after she had identified her police statement, when asked why in her statement she stated that she

was attacked as she opened the gate to her home, she said it is how it happened. Asked why in the statement she said her two cell phones were taken by the assailants before they raped her, she said it is how she put it. The complainant in her police statement also said while the appellant was strangling her with a square from behind his companion stood in front of her legs and he is the one who started to undress her of her tights and underwear, which conflicts with her evidence in court. In fact in her police statement it is the appellant's companion who first raped her. The complainant asked why it did not appear in her police statement that the appellant said 'don't be afraid neighbour,' said she did not think of it at the time. The complainant stated that she recognised the appellant when he came on top of her for the second time without explaining why she did not recognise the appellant when he first tried to rape her.

[16] She said they would come across the appellant when he was with one or two other people. She had come across him four or five times. She said she paid particular attention to the appellant because as he was on top of her for the second time, he was the kind of a person who was just talking with her saying he wanted her for a long time, and that at times he saw her at the top or when she was walking on the street. She said she asked him why when he saw her he did not ask her out instead of raping her but the appellant said nothing to that. She asked him for the sim card and he said he would give it to her. She said the appellant's companion when she asked the appellant why he did not ask her out, struck her with a fist. He whilst he was on top of her hit her asking her why was she looking at him. Asked why in her police statement, she did not state that she had a conversation with the appellant. She said she was told that she would say everything in court.

[17] The complainant asked, why she stated in the police statement: 'I tried to look at them, the other one with a building square struck or hit me with his fist and it became dark for me to see their faces', she said that he said that at the time when she was already on the ground and he had removed this iron piece from her neck . She said when he struck her it was at the time when they were raping her. The complainant was referred to her statement which read as follows: ' The African, unknown make who was

standing in front of my legs started to undress, started with my tights and underwear he calmly took out his belt, I did not see him, he opened his zip but with no condom on, he started to rape me, forcing his penis in my vagina, but he did not finish because his penis got un-erected so he stopped and got up to strangle me whilst the other one raped me after him until he ejaculated, he was also not wearing any condom'. The complainant said her statement stated what she said in her evidence; she denied that her version in court differed from the version in her police statement. She said the appellant's companion when he was penetrating her and he saw that she was looking at him, put his hand over her eyes. She said the other person was wearing black pants and a Pirate Football Clubs t-shirt black. She said when the appellant spoke to her he stammered, but she could not disagree if told that the appellant does not stammer because she did not talk to him for a long time. The complainant asked, if she had a similar opportunity to identify the appellant and his companion why would she was not be able to identify the other person, she said she did not know what to say. She said 'even though it was dark, what I told myself was to concentrate on one of them even if it was dark, I would not have gone and alleged that it was him when it was not. She confirmed that as recorded in her statement that after they were done they told her to remain down and not to wake up as they fled the scene.

[24] The other evidence lead by the state was the medical evidence, the evidence of the constable who took a warning statement from the appellant and the evidence of the complainant's husband. It is not necessary to summarise this evidence. The appellant testified and he denied being involved in the incident.

[25] The evidence of the doctor confirmed complainant's injuries around the neck area. The evidence of the complainant's husband serves as evidence of a first report but otherwise it did not take the state case anywhere. The evidence of constable Mthimthulu as it relates to what the appellant said to the constable and what the appellant pointed out to the constable accompanied by certain utterances required that its admissibility be determined. The defence indicated that the warning statement was challenged, that the accused's constitutional rights were not observed in taking the

warning statement, and that the police threatened the accused with violence to force him to make a statement. The state contended during the trial that the warning statement although placing accused at the scene with a companion, it was exculpatory. There was no trial within a trial held. The learned regional magistrate stated in the judgment that 'in the Warning Statement the accused exonerated himself from the commission of the offences and he pushed the blame to one Jabulani Nhlapho and most importantly, the reading of the warning statement clearly suggests that the accused was present at the place of the incident.' The reading of the warning statement shows that the accused admits meeting with the complainant and taking her cell phone. In my view, the State in order to rely on the warning statement was required to prove its admissibility. It failed to do so which results in that the admissibility of the warning statement was not proved and the reliance on it is irregular. Section 217 (1) (a) of the Criminal Procedure Act 51 of 1977, further, rules inadmissible confession statements made to police officers other than commissioned officers. The warning statement is a confession statement either to robbery or to theft. It constitutes inadmissible evidence since the constable is not a commissioned officer.

[26] In the result, the only evidence that implicated the appellant is the evidence of the complainant. It is evidence of a single witness and it is evidence relating to identification. Therefore, it is evidence to be approached with great caution. The regional magistrate, apart from the warning statement, relied on the identification by the complainant as set out in her evidence. However, the evidence of the complainant that the appellant was a person who would meet and greet her whilst she was with her cousin was not corroborated by the cousin; there was no corroborating evidence that the appellant was in the area at the time or that he was dressed on that day as described by the complainant. The appellant was not arrested as a result of the description given to the police by the complainant. In her police statements, the complainant did not give a description of the assailant that fitted the appellant's description. The complainant was unable to give any description of the person who she said was with the appellant who is a person she observed exactly under the same circumstances as the appellant. She stated that it was dark and it shows that she was

not in a position to make a reliable identification. The complainant, comparing her evidence and the content of her police statement, a statement made soon after the incident, is confusing the roles of the two assailants rendering her identifying evidence unreliable.

[27] The regional magistrate failed, in my view, to approach the evidence correctly, in particular, in putting weight to the evidence of constable Mthimthulu, and in failing to take into consideration the unsatisfactory features in the evidence of the complainant. In *S v Mthetwa* 1972 (3) SA 766(A) at 768A-C the court held: ' Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness ; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the results of identification parades, if any, of course evidence by or on behalf of the accused.'

[28] There is no difference in the identification of the assailant in the case of rape and in the case of robbery with aggravating circumstances. The appellant instructed his legal representative to apply for leave to appeal in respect of the charge of robbery with aggravating circumstances more than three (3) years ago, which was not done. The appeal court has inherent jurisdiction, where injustice would result, to correct irregularities on the proceedings of the lower court. Once the appeal court has found that identification evidence was not sufficient to sustain a conviction of the appellant for rape, it would result in injustice to allow the conviction of robbery with aggravating circumstances to stand. In the exercise of its inherent power the court sets aside the conviction of the appellant on the charge of robbery with aggravating circumstances.

[29] It follows that the state failed to prove the guilt of the appellant beyond a reasonable doubt.

[30] I propose the following order.

1. The appeal against conviction is upheld
2. The conviction and sentence is set aside.
3. The verdict of the Regional Magistrate is replaced with the following verdict:
'Not Guilty and Discharged on both charges.'

Mngadi J

I agree.

Mathenjwa AJ

APPEARANCES

Case Number : AR 267/18

For the Appellant : Bongani Mbatha

Instructed by : Legal Aid South Africa
DURBAN

For the respondent : M. Chamane

Instructed by : Deputy Director of Public Prosecutions
PIETERMARITZBURG

Heard on : 17 March 2023

Judgment delivered on : 24 March 2023