

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



CASE NO: A55/2018

Delete whichever is not applicable
(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 12 /11/ 2018


Signature.....

In the matter between:

SEBOGO, LESLEY

First appellant

KHASELA, TSEPO

Second Appellant

and

THE STATE

Respondent

J U D G M E N T

MAIER-FRAWLEY AJ:

1. The appellants were convicted in the regional court presiding at Randfontein of the crimes of robbery with aggravating circumstances (count 1) and attempted robbery with aggravating circumstances (count 2). In addition, the first appellant was convicted of four counts of rape (counts 3 to 6).

2. The trial court sentenced the appellants as follows:

Appellant 1:

Count 1: 15 years of imprisonment.

Count 2: 6 years of imprisonment.

These two sentences were ordered to run concurrently.

Counts 3 to 6: 15 years of imprisonment in respect of each count, however, these sentences were ordered to run concurrently.

The first appellant's effective term of sentence is thus 30 years imprisonment.

Appellant 2

Count 1: 15 years of imprisonment;

Count 2: 6 years of imprisonment.

These two sentences were ordered to run concurrently.

Appellant 2 was acquitted on counts 3 to 6 (rape) at the end of the State's case.

The first appellant's effective term of sentence is thus 15 years imprisonment.

3. In addition, both appellants were declared unfit to possess a firearm in terms of section 103 (1) of Act 60 of 2000.
4. The appeal to this court is with the leave of the trial court and lies against both conviction and sentence.

5. A summary of the matter is that one of the complainants was raped twice by the first appellant, and twice by another person, who was not arrested or charged, hence, the four counts of rape in the case of appellant 1. He was charged with these offences in terms of the provisions of section 51(2) of the Criminal law Amendment Act, 105 of 1997 ('CLAA'), and not section 51(1) in terms of which rape by a person more than once or by more than one person would have been punishable by means of a minimum sentence of life imprisonment.

Background:

6. The first complainant (Ms. M) testified that she and Mr. Eric Witbooi (second complainant) were accompanying another friend en-route to his destination when they passed by a group of people of which the appellants formed part. On their return, the first complainant noticed that both appellants were standing with one other person who was dressed in a maroon t-shirt, at a different spot located in the middle of a football field. She recognised the appellants as she had passed by them earlier. As the complainants reached the area of a tuck shop, the appellants, accompanied by the unknown suspect, approached them from behind. They were in possession of a knife when they grabbed the complainants. Cell phones and money were demanded from both the complainants. Mr Witbooi was searched and assaulted by the second appellant and the unknown suspect. Ms. M was assaulted by the first appellant when she tried to walk away. The appellants and the unknown suspect robbed Mr. Witbooi of his belt, identity document and ATM bank card. They also demanded his pin number, which Mr. Witbooi eventually provided in the struggle.
7. The complainants were thereupon taken to an abandoned house where they were initially locked inside a toilet whilst the appellants and the unknown suspect were having a discussion. When the toilet was opened, the second appellant was not present any longer. They were told that the second appellant had gone to the ATM to withdraw money. The complainants were then taken to another area and ordered to lie on the ground until the second appellant returned, which is when

Mr. Witbooi was again assaulted. He managed to escape, leaving the first complainant behind. The first complainant was taken to a darker spot in the veld where the first appellant tied her to a tree with a belt and removed her clothes. She was later untied and ordered to lay on the ground, whereupon the first appellant proceeded to rape her by penetrating her vagina with his penis without her consent. Afterwards, the unknown suspect also raped the first complainant whilst the first appellant was standing aside, watching. When the unknown suspect had finished, the first appellant raped the first complainant for a second time, followed by the unknown suspect who also raped the first complainant for a second time.

8. Mr Witbooi testified that R1000.00 had been withdrawn from his bank account. He said that he knew the first appellant by sight prior to the incident. In addition, the complainants identified the perpetrators by means of their clothing, height and complexion. During the commission of the robbery and attempted robbery, both complainants were in close proximity to the perpetrators in a well-lit area located near a Spaza shop. They thus had both the means and opportunity to observe their features. The undisputed evidence was that the complainants were in the presence of the same three assailants, at least until such time as the second appellant left the group to go and withdraw money and the second complainant managed to escape. The appellants were initially pointed out by the second complainant after the incident and arrested. The first complainant's evidence that she identified the second appellant as one of the robbers amongst 7 other people inside a police cell at the police station was never disputed by the second appellant.
9. Both appellants denied that they were at the scene or that they participated in the commission of the offences. They relied upon alibis. The primary issue in dispute concerned the identity of the perpetrators, that is, whether the first and second appellants were two of the robbers, and whether the first appellant was one of the persons who had raped the first complainant.
10. As regards the defence of mistaken identity, the defence relied upon the leading cases on identification, amongst others, *S v Mehlape* 1963 (2) SA 29 (A) , *R v*

Shekele 1953 (1) SA 636 (T) at 638; *S v Charzen and another* 2006 (2) SACR 143; *S v Mthetwa* 1972 (3) SA 766 (A) at 768A and *S v Nango* 1990 (2) SACR 450 (A). The principles relating to identification are trite.

11. The courts have long recognised that alibi evidence should be approached with caution. The principle is aptly stated in *R v Cleghorn*,¹ where the following is said:

‘...there is good reason to look at alibi evidence with care. It is a defence entirely divorced from the main factual issue surrounding the *corpus delicti*, as it rests upon extraneous facts, not arising from the *res gestae*. The essential facts of the alleged crime may well be to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance.’²

12. The first complainant was deemed to be a single witness in respect of the rapes committed against her. In terms of s 208 of the Criminal Procedure Act, 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so-called ‘cautionary rule’ was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G as follows:

‘There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded” (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted

¹ 100 CCC (3d) 393, quoted with approval in *Thebus and Another v S* 2003 (6) SA 505 (CC) at para 60.

² Id at para 22 from the minority judgment of Major J, which does not appear inconsistent, on this point, with the approach found in the majority judgment at para 4.

in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

13. The trial court considered the issue of identification of the robbers at *inter alia*, page 152 of the record where it is stated:

'They also corroborated each other that the visibility was good and clear at the spot where they first met the accused.

This must be viewed in light of the fact that the complainants testified that they had seen both the first and the second appellants prior to the robbery and that the first appellant was known to the second complainant by sight, since they resided in the same area. More significantly, blood which was found on the complainant's underwear was found to match the DNA of the first appellant. This evidence independently corroborates the first complainant's version. As opposed to this, the first appellant relied upon an alibi, which was, in my view, rightly rejected by the court in the light of the overwhelming conspectus of evidence pointing against its credence.

14. The crisp issue which this court has to determine is whether the findings of the trial court are in accordance with justice or whether such court erred in its findings.
15. The correct approach to the evaluation of evidence in a criminal trial was enunciated by the Supreme Court of Appeal as follows in *S v Chabalala* 2003(1) SACR 134 (SCA), at paragraph 15:

'The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party

(such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...¹

16. Higher courts have cautioned that an accused's claim to the benefit of a doubt, when it may be said to exist, must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.³
17. In the determination of its verdict, the trial court looked at the totality of the evidence. See: *S v van der Meyden* 1999 () SACR 97 (W). Secondly the trial court accepted that the onus was on the prosecution to prove its case beyond reasonable doubt, and, on the question of an alibi, that the alibi was false beyond reasonable doubt.
18. The first appellant's version was a denial of his involvement the incident or that he knew the first complainant. The version of the first complainant was bolstered by the objective DNA results, which to my mind, constitutes corroborating evidence that the first appellant in fact had sexual intercourse with the complainant. That evidence was, to say the least, compelling.
19. The trial court was, in my view, correct in convicting the first appellant of rape, at least on the two counts in respect of which she alleged he had intercourse with her without her consent.

³ See: *S v Sauls and Others* 1981 (3) SA 172 (A) at 182G - H; *S v Rama* 1966 (2) SA 395 (A) at 401; *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-h.

20. The prosecution also relied upon the two counts of rape of the unknown suspect who was not arrested or charged. It relied upon the principle of common purpose. Once again the principle of common purpose is well established. See: *S v Sefatsa* 1988 (1) SA 868 (A), *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706C,⁴ *S v Thebus and Another* 2003 (6) SA 5005 (SCA).

21. On the evidence of the first complainant, which was accepted by the trial court, the complainant was raped four times, twice by the first appellant and twice by the suspect who was not arrested. The question is whether the appellant must pay for the wrongs of another. The issue of common purpose and its requirements, as set out in *Mgedezi supra*, clearly indicate that that can be the case. The doctrine of common purpose was ratified in the constitutional era by Justice Moseneke in *Thebus and Another v S* 2003 (6) SA 505 (CC) at paras 65 & 68. It was not contended on behalf of the first appellant at the hearing of the appeal that the requirements of common purpose were not met on the facts of the present case.

22. When appraising the alibi evidence, the trial court found that the alibi of the first appellant should be rejected on the basis that his blood was found on the underpants of the first complainant. It reasoned that if he was not there, this begs the question as to how his blood could have been identified on the first complainant's underpants by means of DNA.

⁴ Where the court in *Mgedezi* said the following: "In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Sefatsa & others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

23. As regards the second appellant's alibi, in my view, when evaluated in the light of all the evidence, the alibi of the second appellant was also rightly rejected by the trial court.⁵
24. The appeal in respect of conviction should accordingly be dismissed.

Sentence

25. It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court.⁶ As pointed out in *Hewitt v The State* (637/2015) [2016] ZASCA 100 (9 June 2016),⁷ an appeal court '...may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not.⁸ Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it.⁹ So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.¹⁰

⁵ See: para 11 above. As an aside, the trial court correctly rejected the version of the second appellant that he did not know the first appellant, as false. The second appellant testified that he 'nearly knew' the first appellant, yet in the next breath, he stated that he did not know him. Both appellants supplied their addresses as Moteane Street in Mohlakeng and when confronted with this, the second appellant denied having supplied such address to the police. Later he stated that he knew the first appellant by sight and by the name of Lesley. He subsequently elaborated that he knew the first appellant since 1999 and that they both stayed in the same area. The learned magistrate considered the evidence in the light of the reliable and credible identity evidence that had been tendered by the complainants. In the light of his evaluation of all the evidence, it comes as no surprise that the evidence of the second appellant was rejected as false by the learned magistrate.

⁶ *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8; *S v Swart* 2000 (2) SACR 566 (SCA) para 21. See also, *S v L* 1998 (1) SACR 463 (SCA) at 468f; *S v Blank* 1995 (1) SACR 62 (A) at 65h-i.

⁷ At para 8.

⁸ *Sadler*, para 10.

⁹ *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

¹⁰ *S v Snyders* 1982 (2) SA 694 (A) at 697D; *S v N* 1988 (3) SA 450 (A) at 465I-J; *S v Shikunga* 465I-466A; *S v Shikunga & another* 1997 (2) SACR 470 (NmS) at 486c-f. See also *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* 1987 (3) SA 717 (A) at 733E-G; *S v Petkar* 1988 (3) SA 571 (A) at 574D; 1997 (2) SACR 470 (NmSC) at 486d. See also *S v Abt* 1975 (3) SA 214 (A); *S v Birkenfield* 2000 (1) SACR 325 (SCA) para 8; *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* fn 3 at 733E-G.

26. The rape of the first complainant warrants a sentence of 15 years on each count in terms of section 51(2) of the CLAA. The CLAA prescribes that upon conviction and in the absence of substantial and compelling circumstances, the court is to impose such a sentence. In *S v Malgas* 2001 (1) SACR 461 SCA at para 25D, Marais JA cautioned that courts should not deviate from the prescribed sentences lightly or for flimsy reasons. This view was subsequently endorsed in *S v Matyityi* 2011 (1) SACR 40 SCA at para [11].
27. The courts are duty bound to send out a clear message that perpetrators of serious crimes will be punished appropriately and courts are moreover required to show due deference to the legislature's enactments of laws. See: *Matyityi supra*.
28. Rape under *any* circumstances is a deplorable and terrible crime. See: *S v Chapman* 1997 (2) SACR 3 at 8. It is an act of heinousness that defies logic and disaffiliates from sense and sensibility. In my view, it is nothing more than a show of power and control which is aimed at annihilating the dignity of its prey. Moreover, it is known to leave far-reaching yet oft unseen wounds upon the psyche of its victims. That is undoubtedly why the legislature enacted such serious punishments for such offences.
29. The question which needs answering is whether the sentence imposed induces a sense of shock in that it offends one's sense of justice, being disproportionate to the interests of the individual and society and the seriousness of the offence.
30. The first appellant was 25 years of age when the crimes were perpetrated. He was a mature man. His behaviour, by any stretch of the imagination, cannot be accepted, nor should it be tolerated. He has shown no remorse for his actions and furthermore denied that he committed the crimes, notwithstanding the overwhelming evidence against him.

31. Although the second appellant was 23 years old when the crimes of which he was convicted were committed, he had a previous conviction for robbery with aggravating circumstances. He likewise showed no remorse for his actions, remaining unrepentant instead. His prior sentence seemingly failed to deter him from committing another violent crime.

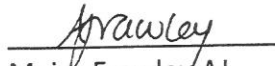
32. As pointed out in *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi* 2012 (1) SACR 423 (SCA) at para 19, 'when weighed against the objective gravity of these offences, their prevalence in South Africa and the legitimate expectations of society that such crimes must be severely punished, neither the youthfulness of the respondents nor their prospects of rehabilitation tip the balance in their favour.'

33. It was submitted on behalf of the appellants that the trial court ought to have considered the period each appellant had spent in custody awaiting trial.¹¹ As pointed out by counsel for the respondent, this factor, taken on its own, does not constitute a substantial and compelling circumstance. The correct approach is rather whether the effective sentence meted out is proportionate to the crimes committed. In my view, the effective sentence of 30 years imprisonment in respect of the first appellant and that of 15 years imprisonment in respect of the second appellant, is in accordance with the prescribed minimum sentencing regime and is proportionate to the serious and highly prevalent crimes committed. Had the first appellant been charged under the provisions of section 51(1) of the CLAA, as he could have been, he would have been given a sentence of life imprisonment in respect of his rape conviction. The fact that the magistrate ordered the sentences to run concurrently in respect of the counts of robbery and rape, indicates that the learned magistrate properly applied his mind to the imposition of sentence, taking

¹¹ It was accepted on behalf of the appellants at the hearing of the appeal and in written argument presented to court, that there was no indication that any unreasonable delays had occurred in the conduct of the trial.

into account the time spent by the appellants in custody whilst awaiting trial and the triad of traditional factors mentioned in *S v Zinn* 1969 (2) SA 537 (A).

34. In my view, having found that there were no substantial and compelling reasons to deviate from the prescribed minimum sentence, the court was entitled and indeed enjoined to impose the sentence it did in respect of the offences for which the appellants were respectively convicted. The effective sentence given to the appellants is neither unreasonable nor shockingly inappropriate. The appeal in respect of sentence should accordingly be dismissed.


Maier Frawley AJ

I agree


Fisher J

Date of hearing:
Judgment delivered

22 October 2018
12 November 2018

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