



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **A253/2018**

In the matter between:

MOJALEFA JOEL MOROBE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: NAIDOO, J *et* MOLITSOANE J

JUDGMENT BY: NAIDOO, J

HEARD ON: 26 NOVEMBER 2018

DELIVERED ON: 26 NOVEMBER 2018

INTRODUCTION

[1] The appellant was charged with one count of Housebreaking with Intent to Rape and Rape (count1), one count of Rape (count 2) and one count of Robbery with Aggravating Circumstances (count 3) in the Regional Court, Virginia. He pleaded not guilty to all three counts but, on 29 March 2017, was convicted on counts 1 and 2, after the trial proceeded. He was sentenced on the same day to Ten (10) years' imprisonment each on counts 1 and 2, and the court ordered the sentences to run concurrently. The court made no order in terms of section 103(1) of the Firearms Control Act 60 of 2000. The appellant applied to the court *a quo* for leave to appeal against the convictions and sentences and such leave was refused. He comes before us, having successfully petitioned the Judge President for leave to appeal against the convictions. Mr PL Van Der Merwe represented the appellant in this court and Mr DW Bontes represented the state.

BACKGROUND

[2] The complainant in count 1 was asleep in her bedroom at her home, and her two children were sleeping in the same room. She was awakened at about 23h00 by the presence of a man in her bedroom. He wore a balaclava and she was unable to identify him. This man raped her at knifepoint, in the presence of her children. It subsequently turned out that the appellant was related to the complainant, and had visited the complainant and her family on many occasions at her house. He referred to the complainant's husband as his brother, and became aware, after the incident, that her husband was working away from home at the time she was raped. The appellant indicated that he was arrested after the

complainant consulted a traditional healer who had informed her that the appellant was the person who had raped her.

- [3] The complainant in count 2 was 16 years old at the time that she was raped. Her evidence was that she was returning home at approximately 18h00, after visiting her friend. She was accosted by two men, who dragged her to a toilet and raped her. She was then forcibly dragged to another place where she was raped again by one of the men. The complainant was able to remember the face of the first man who had raped her and was unsure of the identity of the second man. She was not able to positively identify the appellant as one of her rapists, although she indicated that he looked familiar. This complainant offered no evidence regarding count 3. The state handed up, as exhibits, the relevant medical examination forms, referred to as the J88 forms pertaining to both complainants, records of the evidence collection kits prepared by the medical professionals who examined both complainants, a J88 form relating to the appellant, when blood was drawn from him to serve as a reference sample for DNA analysis, as well as a DNA analysis report. The state also called the evidence of the forensic analyst, who was responsible for compiling the DNA report.
- [4] The appellant was legally represented at the trial and tendered a version that amounts to a bare denial. With regard to the DNA evidence, he said that the documents were correct, but that the forensic analyst was lying. With regard to count 2, he testified that he had never been to Bethlehem, so it could not have been he who raped the complainant. His objection against the evidence of the forensic expert was dealt with by the court a quo, which correctly placed no reliance on the assertions of the appellant as it

was apparent that he did not understand the processes involved in DNA profiling. This is to be expected from a lay person, who cannot be criticised for his lack of knowledge of such a specialised field of science.

[5] In listing the grounds of appeal in respect of the convictions, the appellant contends that the court erred in making the following findings:

- 5.1 that the state proved the guilt of the accused beyond reasonable doubt;
- 5.2 that there are no improbabilities in the state's version;
- 5.3 that the state witnesses gave evidence in a satisfactory manner;
- 5.4 that the evidence of the state witnesses can be criticised on matters of detail only whereas the evidence was contradictory in material respects;

The appellant also contends that:

- 5.5 the court failed to properly analyse the evidence of the state witnesses;
- 5.6 the court did not properly consider the improbabilities inherent in the state version.

[6] All the exhibits handed up by the state, as evidence, were done so with the consent of the defence. The court correctly found that although the complainants in counts 1 and 2 were unable to identify the persons that raped them, the evidence of the forensic analyst with regard to the DNA profiling was of importance in linking the appellant to the offences with which he was charged. The court also correctly accepted that the state's case was based on circumstantial evidence, and in its analysis of the evidence tendered by both the state and the defence, essentially found that evidence of the forensic analyst was satisfactory and reliable,

especially with regard to the processes involved in obtaining the results of the DNA profiling.

- [7] An internal cervical swab which was obtained from the complainant in count 1 and the underwear of the complainant in count 2 were tested and compared with results yielded by the system in respect of the reference sample of blood taken from the appellant. The results relating to the samples in respect of both complainants matched the DNA profile in respect of the appellant. The forensic analyst explained that when the analysis was undertaken in respect of the sample from the complainant in count 1, the older system using a ten-point analysis was used. The newer sixteen-point analysis was used by the time the analysis in respect of count 2 was done. The accuracy of both tests is plain to see from the DNA analysis report. The acceptance by the court *a quo* of the DNA report, and the rejection of the appellant's version as not being reasonably possibly true, cannot, therefore, be faulted.
- [8] As indicated, the trial court recognised that the state's case was based on circumstantial evidence, and correctly applied the principles set out in the celebrated case of **S v Blom 1939 AD 188**, which sets out the "cardinal rules of logic" to be followed when dealing with circumstantial evidence. In essence, Blom's case states that the inference sought to be drawn must be consistent with all the proven facts, which must be such that they exclude all other reasonable inferences, save the one sought to be drawn. If the proven facts do not exclude all other reasonable inferences there must be doubt as to the correctness of the inference sought to be drawn. The trial court's analysis of the evidence and conclusions based thereon indicate that the only

inference to be drawn from the circumstantial evidence presented by the state is that the appellant was the person who raped the complainants in counts 1 and 2

- [9] When dealing with circumstantial evidence, a court is implored not to deal with such evidence on a piecemeal basis but to examine the evidence in its totality. It is also necessary for the court to distinguish between inference and conjecture. [See **S v Reddy** 1996(2) SACR 1 (A); **S v Cooper** 1996(2) SA 875 (T)].

In the present matter, I am of the view that the trial court discharged the duty placed on it to properly and thoroughly weigh up the evidence in its totality in order to make the findings that it did in respect of the guilt of the appellant.

- [10] Mr Van Der Merwe, in his heads of argument, as well as his oral address in court, candidly and correctly conceded that the trial court did consider the evidence in its totality, that its finding that the forensic analyst was a credible witness cannot be faulted, and that the court committed no misdirection in coming to the conclusion that the appellant was correctly linked to the offences by the DNA evidence. Mr Bontes stood by the submissions made in his Heads of Argument

- [11] In the circumstances, the following order is made:

11.1 The appeal against the convictions herein is dismissed.

11.2 The convictions and sentences imposed on the appellant are confirmed.

NAIDOO J

I concur

MOLITSOANE J

On behalf of Appellant:

Instructed by:

Adv. PL Van Der Merwe

The Justice Centre

Bloemfontein

On behalf of Respondent:

Instructed by:

Adv. DW Bontes

The State