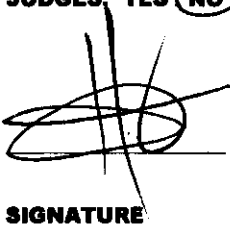


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASE NO: A893/ 2015

(1) REPORTABLE: YES ☒ NO	
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO	
(3) REVISED	
16/02/17	
DATE	SIGNATURE

16/2/2017

THABO GODFREY MONOKETSI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT DELIVERED ON 16 FEBRUARY 2017

VILAKAZI, AJ:

- [1] On 3 August 2010, appellant appeared in Bloemhof Regional Court, facing 2 charges, one of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA) (read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the "Act") and the other, rape in terms of section 3 of the Sexual Offences Act 32 of 2007.
- [2] The charge of rape was subject to the provisions of section 51 read with Part 1 of Schedule II of the "Act", in that the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant and the complainant was raped by more than one person and/or more than once. This means that upon conviction he faces the prospect of life imprisonment unless substantial and compelling circumstances are found to have existed. A charge of robbery with aggravating circumstances was also subject to the provisions of section 51(2) read with Part 2 of Schedule II of the "Act" which means that upon conviction he faces the prospect of being sentenced to 15 year imprisonment absent to finding substantial and compelling circumstances.
- [3] The appellant tendered a plea of guilty to the charge of robbery with aggravating circumstances, but pleaded not guilty in respect of the rape.
- [4] The appeal before us is against both conviction and sentence. The central issue in this appeal turns on the identification evidence.

- [5] The brief background regarding this matter is that the appellant was accused 3 in the main trial. He was convicted and sentenced on 6 October 2011 to life imprisonment for a charge of rape and 5 years imprisonment on a charge of robbery with aggravating circumstances.
- [6] It is necessary at this stage to set out the salient facts: The appellant, together with his erst- while 3 co-accused were charged with rape and robbery. At the trial court the appellant was accused 3 and his co - accused were accused 2 and 4 respectively. Accused 2 pleaded not guilty to all charges. Both accused 2 and 3 pleaded guilty to a charge of robbery and not guilty of rape. In essence they put all the elements of this charge against them in issue. The appellant denied that he raped the complainant. He admitted that he was in the company of the three co-accused when he approached the complainant. He further admitted that he had a knife for the purpose of threatening the complainant to hand over her personal belongings. After robbing the complainant of her personal belongings he left. He denied dragging the complainant to the scene of the rape.
- [7] I now turn to the merits of the appeal. The charges against the appellant's co - accused 1 were withdrawn by the State. As far as accused 2 is concerned, he was acquitted on all of the charges and discharged in terms of section 174 at the conclusion of the States' case. The appellant admitted that she robbed the complainant of her pendant.
- [8] The complainant gave evidence in relation to both charges. She testified that on 31 August 2009 she was at Barristers tavern near Tswelelang until the early hours of the morning when she left for home. She requested one Ronny to accompany her home. Ronny walked her half way. After they went their separate ways, she was accosted by a group of 4 (unknown) males. One of them grabbed her, whilst the other one wielded a knife. She pleaded with them not to harm her. Her pleas fell on deaf ears. She was robbed of her money, cell phone and necklace.
- [9] They dragged her into a dark house in a nearby stadium and instructed her not to scream. They threatened to kill her if she screamed. They stripped her naked and thereafter ordered her to lie on the floor. The appellant and his three other co-accused gang-raped her. Thereafter one of the assailants instructed her to put her clothes on. Her undergarment was left at the scene. After this ordeal 2 of the co-accused left the scene. She left this room with one of the accused, who ran away and she also ran home. She testified that these four males stared at her in Barristers Tavern. She knew one of the accused as Dikgomo's son and knew accused 1 as Paballo. It was her first time seeing the other accused.
- [10] She sought refuge at home and told her cousin what had happened. Her cousin phoned the police and the next morning she recovered her earrings at the scene of the crime.
- [11] Constable Phakedi, the investigating officer testified on behalf of the State. She stated that on 2 September 2009, she arrested Paballo Maruping, accused 1. This arrest led to the further arrest of accused 2, 3 and 4. She testified that accused 2 associated himself with the commission of the offence, however this was not admissible because no confession was made. Appellant was found in possession of the necklace. The necklace of the complainant was handed over by the appellant to her at appellant' house. Accused 4 was found in possession of the complainant's mobile phone, which he handed over to her and was identified by the complainant on 16 October 2010. No identity parade was held.

- [12] The appellant testified and denied the substance of the complainant's evidence. In particular he denied that he was party to dragging and raping the complainant. In cross-examination he stated that after he robbed the complainant of her items at knifepoint, he left and therefore has no knowledge of what transpired after his departure.
- [13] The trial court found that the following were common cause:
- a. The 4 males and complainant, prior to this incident were in Barristers Tavern.
 - b. The complainant was accosted by 4 men and this was corroborated by appellant
 - c. The appellant robbed the complainant of her belongings at knifepoint.
- [14] The trial court evaluated the evidence of the complainant and the defence and concluded that the complainant's evidence was truthful. It found that four men dragged the complainant to the nearby stadium and all raped her interchangeably. Against that, it found the appellant had planned to commit this crime when they starred at her while she was at the tavern. In execution of the plan they followed the complainant, robbed and raped her. The trial court found it improbable that the appellant's interest was purely to rob the complainant of her belongings. The trial court concluded that the appellant associated himself with accused 1 and consequently should be held accountable "to what accused 1 did to the complainant."
- [15] Counsel for the appellant submitted that the State had failed to prove that the appellant raped the complainant. Secondly, the appellant submitted that the trial court ought to have treated the evidence of the complainant who was a single witness with the necessary caution. In support of this contention counsel relied on **S v Sauls 1981 (3) SA 172 (A) at 180 E-G**. It was further submitted on behalf of the appellant, that a J88 medical report was not produced in support of the State's case.
- [16] The central issue in dispute is the identity of the people who raped the complainant, whether the trial court was wrong in holding that there was proof beyond reasonable doubt that the appellant was one of the persons who committed rape.
- [17] It is trite that evidence of identification is approached by the courts with some caution. The cautionary approach was enunciated, **S v Mthethwa 1972(3) SA 766 (A) at 768 C**" It is not enough for the identifying witness to be honest; the reliability of his observation must also 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 result of the identification parades, if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of totality of the evidence and the probabilities. "The appellant's counsel attacked the complainant's lack of description of her assailants, particularly the appellant, the role he played in the rape ordeal. He contended that the magistrate erred in convicting the appellant on the basis that he associated himself with the role played by accused 1. He submitted that the version of the appellant ought to have been accepted as reasonably possibly true.

- [18] The appellant's version is that he was in the company of 3 males when he approached the complainant in the street, threatened her with a knife and robbed her of her belongings and then left. He has no knowledge of the rape and denies it.
- [19] In his judgment, the magistrate stated that although the State has a burden to prove its case beyond a reasonable doubt, he was of the view that based on the evidence as a whole, the complainant was honest and that her identification evidence was reliable. He rejected the version of the appellant and found it to be false.
- [20] In criminal trials the onus rests on the State to prove the accused's guilt beyond a reasonable doubt. If at the end of the trial the court is left in doubt about the guilt of the accused, the latter is entitled to the benefit of doubt and to his discharge. The conviction should be based on the evidence as a whole and should not be based on a portion of evidence tendered.
- [21] It is on the basis of these principles that the trial court determined which of the two versions, that of the complainant or that of the appellant, is to be accepted.
- [22] In so far as opportunity for observation was concerned the complainant stated that she saw the appellant at the gate of the tavern, on the second occasion when he dragged her on the soccer field in the stadium at knifepoint. In terms of place and time, one of the persons who raped her is the person who wielded a knife and is light in complexion.
- [23] Is the appellant's version reasonably possibly true? The appellant discloses his identity and places himself at the scene of crime. In his own evidence, he produced a knife and threatened the complainant and thereafter left. He subdued her, depriving the complainant of her personal belongings.
- [24] Against this connecting evidence in terms of time factor, the place and situation, the appellant was at Barrister's tavern with his co-accused. He was the only one that had a knife. He handed over the necklace of the complainant to Constable Phakedi. On a conspectus of the evidence as a whole, it is my view that the appellant's version, which is in essence a bare denial, cannot be reasonably possibly true. If I accept the appellant's version as truthful, it means, 4 unknown males emerged elsewhere, pounced upon the complainant and raped her. In my view, if you look at the time, place and reasonableness of the complainant's version, these incidents are so closely connected, it renders the appellant's version nonsensical. Considering the totality of the evidence, I am satisfied that there is no basis on which to interfere with the conviction of the appellant for the rape of the complainant. The appellant's explanation that he was only interested in the complainant's personal belongings lacks persuasion and his version is far-fetched.
- [25] The appeal against conviction is devoid of merit and must be dismissed.
- [26] There are several crucial aspects of the complainant's evidence that called for elucidation and which were not adequately probed. The investigating officer, Constable Phakedi, has indeed failed dismally in her duties in executing the necessary basic spadework, which her job dictates. A few examples to demonstrate this point will suffice for present purposes. The complainant testified that after the incident the police informed her not to take a bath. She was taken by the police to hospital and examined by a doctor. The record indicates no results of DNA.

- [27] Firstly, Constable Phakedi failed to follow up in securing a statement with accused 2 who appeared in court assisted by his guardian. She was tardy and sluggish in the manner in which she handled the investigation. Her feeble explanation in failing to obtain a confession from accused 2 is that the accused was uncomfortable giving a statement in the presence of his father is rather odd. Secondly, no explanation was proffered regarding the incomplete DNA results, despite numerous postponements for DNA results. No plausible explanation was furnished regarding her failure to conduct an identity parade.
- [28] It is noteworthy to mention that the manner in which this investigation was conducted underscores the need for everyone concerned, particularly in rape incidents of this nature to be thorough, diligent and meticulous in the collection of evidence.
- [29] I turn to the question of sentence. The appellant was sentenced to 5 years imprisonment on the count of robbery with aggravating circumstances, life imprisonment on the charge of rape as it found that there were no substantial and compelling circumstances justifying imposing a lesser sentence than life imprisonment.
- [30] In counsel's heads of argument on appeal before us on behalf of the appellant it was contended that life imprisonment in respect of the count of rape is "shockingly harsh" and induces a sense of shock, in that it over-emphasises the seriousness of the offence, the deterrent effect of the sentence and the interests of the society whilst under-emphasising the mitigating circumstances relating to the appellant and the prospects of rehabilitation. It was further submitted on behalf of the appellant that the trial court erred in imposing life imprisonment; it was argued that it is not proportionate to the offence. Appellant's counsel submits the sentence on its own constitute a substantial and compelling circumstance
- [31] These submissions by appellant calls for the analysis of the evidence that was led in the court a quo in relation to both aggravating and mitigating factors. The appellant testified in mitigation of sentence, that he was 21 years old, that he has no children, depended on both of parents. His highest standard of education is Grade 9 and on the day of these incidents he was under the influence of liquor.
- [32] In respect of the seriousness of this offence, as set out in the appellant's section 112(2) statement relating to charge of robbery with aggravating circumstances, the following is reflected; that at about 01h30 on 31 August 2009, amongst a group of 3 males, they pounced upon the complainant. One of his co accused grabbed the complainant by the neck whilst the other one pulled out a knife. He robbed the complainant of her pendant and accused 4 took the complainant's mobile phone.
- [33] In relation to the interest of the community there is no doubt in my mind that the offence of this nature is very serious and calls for a proper sentence to be imposed so that it send a clear message to the would be offenders that such crime will not be tolerated. *In S v Chapman 1997 (3) SA 341(SCA)*, Mahomed CJ stated that "the rights to dignity, to privacy and the integrity of every person are basic to the ethos of the constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and the enjoyment of their lives."

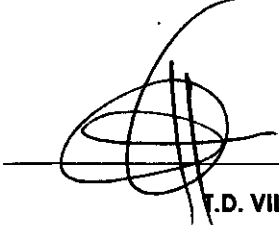
- [34] I disagree. First, the prospects of the appellant's rehabilitation is doubtful in the light of his steadfast denial of any involvement in the gang rape of the complainant. This is so, not only because it involved a premeditated attack by a group of 4 males, the rape was committed after the commission of the crime of robbery with aggravating circumstances. In these circumstances the objective of rehabilitation must clearly play a subordinate role in favour of the objectives of retribution and deterrence.
- [35] In the case of conviction for rape, a sentence of life imprisonment is compulsory, unless there are substantial and compelling circumstances justifying the imposition of a less severe sentence. The appellant was unable to point to any misdirection by the court a quo when he imposed the sentence of life imprisonment.
- [36] In my view, the magistrate's finding that there was no substantial and compelling circumstances was correct. There is nothing on record which drives me in the slightest to a different conclusion, simply for the following reasons:

- 38.1. The appellant's personal circumstances are overshadowed by the aggravating circumstances,
- 38.2. The complainant was dragged by a group of 4 males to the soccer stadium at knifepoint, her life was threatened, stripped naked, one of the assailant pressed her on the ground, while the other one forcefully kept her legs apart. She was raped repeatedly and interchangeably by a group of males. The complainant in her evidence in chief explained that her assailants took turns in raping her, when the one climbs off, the next one went on top of her, whilst the appellant held her at knifepoint.
- 38.3. The trial court alluded that the crime of gang rape is prevalent in their jurisdiction and a majority of cases emanates from taverns. The complainant is psychologically scarred and her dignity was invaded.

- [39]. In my view, I would dismiss the appeal and confirm the conviction on the rape count and sentences.

THE ORDER

- [40]. The appeal against conviction and sentence is dismissed.


T.D. VILAKAZI
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION

I agree it is so ordered


N.V. KHUMALO
JUDGE OF THE HIGH COURT, GAUTENG
DIVISION

DATED AND SIGNED AT PRETORIA ON 15 DECEMBER 2016

MATTER HEARD : 5 DECEMBER 2016

DATE OF JUDGMENT : 16 FEBRUARY 2017

COUNSEL FOR APPELLANT : ATTORNEY S. MOENG (Instructed by Pretoria Justice Centre)

COUNSEL FOR RESPONDENT : ADVOCATE P.W. COETZER (Directorate of Public Prosecutions)