



**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

Appeal number: A126/2016

In the matter between:

JOHANNES BONGANI CHABALALA

1st Appellant

MMETE IKE LETSHOHA

2nd Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* MATHEBULA, AJ

HEARD ON:

15 AUGUST 2016

JUDGMENT BY:

MATHEBULA, AJ

DELIVERED ON:

25 AUGUST 2016

- [1] The appellants were arraigned in the Regional Court, Odendaalsrus on a charge of rape. They were convicted of contravention of **Section 3 read with section 1, 56(1), 57, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007**. They were sentenced to life imprisonment and in terms of Section 103 of Act 60 of 2000 were both declared unfit to possess a firearm. This appeal lies against both conviction and sentence.
- [2] The version of the state was narrated by M. G. (complainant) and Moses Gaurali. On the 10th April 2011 at about 3H00am the complainant left Jabu's Tavern alone for her rented room situated at Blok [...], K., O.. She had been rendering food services at a function that was hosted there. She was accosted by two men who were approaching from the front. They both produced knives and commanded her to walk with them to a secluded place near Mshongoville. As they were walking there both her assailants were flanking her on the left and right hand side.
- [3] They both took her to an open veld and on their arrival there, she was instructed to undress. They took turns to have sexual intercourse with her. The first one to rape her was the one eyed assailant. After he had ejaculated, he then instructed her to wipe her private parts with a tissue paper. He did not use any condom. The second assailant took his turn and after ejaculating, he too barked out the same instructions as the first assailant that she must wipe herself.

- [4] Then the one eyed assailant took his turn again to have sexual intercourse with her. They were temporarily disturbed by the headlights of a police mini bus. They left that spot and went deeper into the veld. On their arrival at the second spot, she was instructed to undress. The two assailants continued to have sexual intercourse with her and every time after ejaculating instructing her to wipe herself with a tissue paper. After they had finished they instructed her to leave the area and walk without looking back, which she did.
- [5] On the main road she met Moses and relayed her ordeal to him. She was advised to wait until the break of dawn before they can report the matter to the police. He confirmed that when he met her she was crying and later accompanied her to the police station. According to Moses there were many patrons at the tavern and on that day he had not seen any of the appellants among them. The complainant had told him that she was raped by two (2) persons and one of them had one eye. She did not mention them by name.
- [6] The 1st appellant took to the stand to deny any involvement in the rape with the 2nd appellant or any other person on the aforementioned day. He testified that he was at home sleeping with his girlfriend though she had slept in another room. Then he called his mother in his defence that he was indeed at home when the complainant was attacked. Her testimony revealed that the 1st and 2nd Appellants were at her residence the day prior to the 10th April 2011. The 2nd Appellant exercised his right to

remain silent and closed his case without testifying or calling any witnesses.

- [7] It was submitted by Mrs Smit appearing on behalf of the 1st Appellant that the evidence of identification by the complainant did not pass the threshold as laid down. In essence that the complainant made a serious of bold and unsubstantiated assertions. These had to be approached with caution as they may be tainted with an element of mistake. Though the state resisted the appeal and supported the conviction, the submission was that the matter is left in the hands of the court.
- [8] Evidence of identification is problematic in nature and must be approached with caution especially in cases where there is a single witness. In addressing its unreliability, the position was espoused as follows in **R v Dladla and Others** 1962 (1) SA 307 (A) at 310 C-E:

'One of the factors which in our view is of the greatest importance in a case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification. In a case where the witness has known the person previously, questions of identification marks, of facial

characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.'

- [9] In the leading case of **S v Mthetwa** 1972 (3) SA 766 (A) at 768A-C per Holmes JA, the court said the following:

“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 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 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 the totality of the evidence, and the probabilities; see cases such as **R. v Masemang**, 1950 (2) SA 488 (AD); **R. v Dladla and Others**, 1962 (1) SA 307 (AD) at p. 310C; **S. v Mehlape**, 1963 (2) SA 29 (AD).”

- [10] The following appears from the record on **page 5** from **line 1 to 24 of volume 1**:

“Goed. Nou vertel vir die hof die mense wat julle daar gesien het kan jy hulle uitwys. Sê hulle name – sonder om hulle name te noem kan jy hulle uitwy (sic) en sê dis die person. Ja.

5 Ja wys hulle. ... Ek verwys na die twee beskuldigdes. Hoekom sê u dit was die twee beskuldigdes wat saam met u ontmoet het daardie dag? ... Die een het ek – het hulle – uitken met die oog want hy het net een oog – herken met die oog wat uit is en die ander een kan ek ken met die gesig.

10 Goed. Kom ons kom nou. Wie het – wie is die een wat jy met een oog uitgeken en wie is die een wat hom met sy gesig uitgeken?

HOF Jy moet harder praat die prokureur hoor haar glad nie. ...
Beskuldigde nommer 1 het ek geken met die gesig en

15 nommer 2 met die oog wat uit is.

AANKLAER Hoe het u nou beskuldigde 1 met sy gesig geken mevrou? Met die heel voorkoms van sy gesig of hoe? Was spesifieke dinge wat u hom met sy gesig geken het?

HOF Sy moenie na 1 kyk nie. ... Ek het die gesig gesien want

20 hy's die een wat baie gepraat het.

AANKLAER As ek u mooi verstaan u het nie 'n sekere kenmerk van hom nie, met die hele voorkoms van sy gesig geken, nie 'n spesifieke ding van sy gesig nie. ...
Net die voorkoms.”;

and on page 6 from **line 1 - 2 of volume 1** the following is recorded:

“En u sê beskuldigde nommer 2 het u hom geken met sy oog – hy het nie een oog nie, die een oog is uit. ... Ja.”

This manner of identification of the 1st appellant was neither tested nor scrutinised.

[11] The 1st Appellant was described as tall and light in complexion. The basis for this was not laid and I am left to speculate as to whether he was indeed tall and light in complexion. On page 27 from **line 17 to 21 of volume 1** of the transcript the following is recorded:

“And I put it to you that both this accused before this court their colour complexion is the same there’s no one who is lighter than the other unless the one has burnt or something.

20 ... According to me they are not the same, the other one is lighter than the other one.”

On page 29 from **line 9 to 17 of volume 3** of the transcript the following appears:

“U Edelagbare, beskuldigde nommer 1, as ek dit
10 nie mis net nie, het die klaagster gesê dat hy ligter, of sy ken hom uit aan sy gesig en sy kleredrag, Agbare. En sy sê ook dat hy ligter as die tweede beskuldigde. Ek weet nie, hy lyk vir my

half donkerder as beskuldigde nommer 2. Maar kan sy 'n fout maak? Ja. Of as sy 'n fout kan maak, dan moet daar

15 seer sekerlik twyfel by die Agbare Hof bestaan en derhalwe versoek ek die Agbare Hof op grond van die identifikasie, beskuldigde nommer 1 onskuldig bevind.”

The illustration above casts more doubt as to whether the complainant was not mistaken in this regard.

[12] The entire incident occurred under extremely trying circumstances for the complainant. She was totally overpowered and beaten into submission by her assailants. She was threatened and humiliated by them. She could not even notice who raped her first the second time. She could not testify as to how long her ordeal permeated in the circumstances. It is on this basis that though confident in testifying, she may be making an honest mistake.

[13] She testified that the 1st appellant was the one who was talking the whole time. Unfortunately this matter was not probed beyond the mere assertion by her. There was nothing that was put before the court as to what he said or what was distinct about his voice.

[14] The complainant was attacked on the 10 April 2011 and gave evidence in court on the 20th March 2012. It is few days short of a year. The complainant emphasized that the 1st appellant was wearing the same clothes as on the day of the incident. There was no basis laid that indeed it was so. This was a typical dock identification. The fact that the 1st appellant was sitting in the

dock would have been suggestive to the witness to identify him as her assailant. See **S v Maradu** 1994 (2) SACR 410 (W) at 413 G-J. The complainant was attacked at a place where lighting though provided by a floodlight, was of poor quality.

[15] The reliability of the witness must be tested. The court has repeatedly held that the list is not exhaustive. The confidence and sincerity of the witness in identifying a person is not enough. The evidence of a single witness has to be clear and satisfactory in every material respect.

[16] In this regard, I am of the view that the court *a quo* took an incorrect approach in dealing with the evidence in totality. The court *a quo* accepted the confidence and firm belief of the complainant without the sufficient basis being laid. As a result, I am of the view that the appeal (as far as the 1st appellant is concerned) ought to succeed.

[17] The 2nd Appellant elected not to testify or call witnesses. He was positively linked through his DNA as the person who had sexual intercourse with the complainant profile. Furthermore he was identified as the one eyed assailant on the day of the incident. Mrs Smit conceded that the 2nd appellant was correctly convicted in this matter and that the appeal on that aspect has no merit. This appeal cannot succeed.

[18] It is common cause that the complainant was raped more than once and by two people at different spots in the veld. The prescribed sentence in the absence of substantial and compelling

circumstances is life imprisonment. The court *a quo* found that there were no substantial and compelling circumstances and proceeded to impose life imprisonment.

[19] It was submitted on behalf of the 2nd appellant that the sentence imposed was shockingly inappropriate. The court of appeal should not lightly interfere with sentence imposed by the court *a quo*. The court may interfere in certain limited circumstances. See **S v Fazzie and Others** 1964 (4) SA 673 A at 684 B-C, **S v Pillay** 1977 (4) SA 531 (A) at 535 E-F, **S v M** 1982 (1) SA 589 (A) at 592 G-H.

[20] It was submitted that there are substantial and compelling circumstances on behalf of the 2nd appellant. The 2nd appellant was still a youth and had completed Grade 9 at school. He was unemployed and still living with his parents. It was also submitted that the sentence can be interfered with because the Victim Impact Report was not made available to the court *a quo* and that according to the Medical Report (J88) there were no visible genital injuries. In essence, the cumulative effect of these factors warranted interference with the sentence imposed by the court *a quo*.

[21] In aggravation, it was submitted on behalf of the state that the complainant was raped multiple times at different spots in the veld. She was at all times threatened with violence and made to undress twice in front of strange men. These men had sexual intercourse with her without a condom. They dehumanised her in every possible manner in the dark of the night without any mercy.

[22] It is indeed so that there was no Victim Impact Report placed before the court *a quo*. The complainant testified that this incident had an impact that she is now fearful of men. The fact that there were no psychical injuries is not enough to exculpate the assailant. See **S v Maile** case number **A169/2012** at paragraph **20**. Therefore I am of the view that the court *a quo* did not misdirect itself on this aspect.

[23] I am therefore satisfied that the court *a quo* did not err on this aspect. This appeal ought to fail.

ORDER

[24] I make the following order

Appellant Number 1

- 1. The appeal is upheld.**
- 2. The conviction and sentence are set aside.**

Appellant Number 2

- 1. The appeal against both conviction and sentence is dismissed.**

MATHEBULA, AJ

I concur

C. REINDERS, J

On behalf of appellant: Mrs L Smit
Instructed by: Legal Aid
Bloemfontein

On behalf of respondent: Adv. AM Ferreira
Instructed by: Department of Public Prosecutions
Bloemfontein