



**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: A119/2016

In the matter between:

THEMBA JOEL GONGOTHA

Appellant

and

THE STATE

Respondent

CORAM:

MBHELE, J *et* MATHEBULA, AJ

HEARD ON:

8 AUGUST 2016

JUDGMENT BY:

MATHEBULA, AJ

DELIVERED ON:

1 SEPTEMBER 2016

- [1] The appellant who was legally represented, was charged and convicted with rape in the Regional Court, Parys. At the conclusion of the trial, he was sentenced to life imprisonment and

declared unfit to possess a firearm. He is now appealing against both conviction and sentence.

- [2] The record in this matter was incomplete and had to be reconstructed by the regional magistrate. The affected dates were the proceedings of the 11 February and 14 March 2014. Both the state and the defence confirmed that the constructed record was the true reflection of the proceedings of those two days.
- [3] At approximately 23H00 on the 3 August 2014, the complainant was at home watching television. Her one brother was sleeping in the bedroom. The door leading to the outside was unlocked as the other brother had still not returned home. While sitting in the dining room, she noticed a person passing next to the window. She thought it was her brother who was returning home and she proceeded to open the kitchen door. It was the appellant. He immediately strangled her and put his hands on her mouth. Further, he pulled her out of their erf. She tried to escape but all was in vain. She was taken to the veld.
- [4] It was at this spot that the appellant undressed and threatened her that if she makes noise she will be killed. He proceeded to rape her. At some point he told her that she must come on top and began stabbing her with a knife. Then he took her to another spot because he saw the headlights of a passing motor vehicle. Again he raped her and stabbed her several times with a knife. She received several stitches which were still visible on the day of the trial.

- [5] The attack on her continued relentlessly and she pretended to be dead. The appellant put on his clothes and left her for dead. She waited for about 5 minutes and thereafter left the scene with the jacket that the appellant had left behind. She saw a light which turned out to be a police motor vehicle. She related her ordeal to them. They took her to the hospital to attend to the excessive bleeding and thereafter to the police station to obtain the statement. Later she went to point out to them the scene where she was raped.
- [6] Her evidence was corroborated by Puleng Elizabeth Barda. She testified that she was a police officer based at Tumahole, Parys. On that day they had attended the complaint in the execution of their duties. They were approached by the complainant near the bridge. She was crying, half naked, dirty, bleeding and carrying some clothes in her hands. She was in pain.
- [7] The complainant told her that she had been raped. Furthermore that the assailant was known to her (complainant) although she did not know his name. She obtained a statement from her and drove her to the hospital. Later the complainant went with them to point out the scene where she was raped.
- [8] The state called three more witnesses to establish the chain from the time the samples were obtained, stored and delivered for forensic analysis. Lastly, the state called Samuel Masegwana who testified that he is a senior forensic analyst with the South African Police Services. He had compiled the report which

positively linked the DNA profile of the appellant to the sample that were collected by the police. In his view, there was overwhelming evidence that the tests were correct and the appellant properly identified.

[9] The appellant testified in his defence and did not call any witnesses. According to him, he met the complainant at Blue Train Tavern. A conversation ensued between them and he lent her his long sleeve skipper jersey because it was chilly that evening. He consumed few beers there and later left to go home. At no stage did he have any sexual intercourse with or inflicted stab wounds on the complainant. He further testified that the police were misleading the court that he was positively linked through his DNA profile.

[10] I'm satisfied that the court *a quo* was correct in finding that the appellant is the one who raped the complainant on that fateful day. The court accepted her evidence and the issues that needs to be decided in this matter will be so decided on the basis of her evidence. The appellant penetrated the complainant by putting his finger in her private parts. This was followed by putting in his penis. He coerced her to come on top because he was not feeling anything. In the third instance he took her to another place where there was a rubbish dump and commanded her to lie on her back with him on top of her. On that instance he penetrated her again with his penis.

[11] The enquiry whether the appellant raped the complainant more than once is a factual matter. Each case has to be decided on its

own facts. **In S v Blaauw** 1999 (2) SACR 295 (W) at 300 C-D per Bochers J, the court set out the approach as follows:

“Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place. The complainant was asked to explain how a single act of rape took about two hours and she then proceeded to supply the details I have quoted above. She was describing, in my view, at least two separate acts of rape.”

- [12] Complainant was forcibly dragged from the comfort of her home and frogmarched under threat of violence to an open veld. There she was violently undressed and made to lie on the damp ground. A finger was inserted in her private parts. Thereafter, she was penetrated the second time with a penis. It is unclear from the record whether the appellant ejaculated or not. However, he withdrew and continued to drag the complainant to another spot which turned out to be a rubbish dump. There he penetrated her with the penis for the third time. In addition while raping her, he was inflicting several stab wounds on her body. This in my view, equals to multiple penetration of the complainant by the appellant. In so doing, it can be inferred that on each penetration, the appellant had intended to rape the complainant on that occasion.

- [13] The prescribed or mandatory sentence in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 is life imprisonment. The court can only deviate to impose such sentence if there is existence of substantial and compelling circumstances and impose a lesser sentence. The court considered the personal circumstances of the accused, the seriousness of the crime and the interest of society. These aspects viewed in totality, the court did not find substantial and compelling circumstances and decided that life imprisonment was the appropriate sentence.
- [14] The appellant was presented as a 31 year old person, unmarried with two minor children of 8 years and 14 months respectively. He had attended formal school up to Grade 11. Prior to his arrest he was employed at a construction company earning R1 200 every fortnight. He had two previous convictions of assault and malicious damage to property. The use of force is a lurking element in these previous convictions.
- [15] The offence of which he was convicted is a serious one. It is humiliating and degrading to the victim. It is perpetrated against the defenceless members of the society. It happened at the sanctuary of the complainant and is debilitating to the freedom of movement and association of the victim. See **S v Chapman** 1997 (2) SACR 3 (A) at 5 B-C.
- [16] This was the worst kind of rape. The appellant executed his mission in the most brutal manner. During the time he was violating the person of the complainant, he inflicted several stab

wounds. At some stage he left the knife stuck behind her ear. It was a sadistic attack. The brutal deed continued to a point where she was out of breath. It appears that the brutal assault stopped and she lived to tell the tale primarily because she faked her death. It was at this point that the appellant relented and ran away from her.

- [17] The court *a quo* evaluated all the evidence and imposed the sentence that has been alluded to. I am of the view that the sentence imposed is not shockingly inappropriate. The court did not misdirect itself and the court of appeal should not lightly interfere with it. The court *a quo* interpreted the law in a correct manner and I cannot find fault in the reasoning. This appeal ought to fail.

ORDER

- [19] The appeal is dismissed.

MATHEBULA, AJ

I concur

NM MBHELE, J

On behalf of appellant:
Instructed by:

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Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent:
Instructed by:

Adv. DW Bontes
Office of the Director: Public Prosecutions
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