



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 No. 106/2016

In the matter between:

JOHNNY JOSEPH MOKOENA

Appellant

And

THE STATE

Respondent

CORAM:

REINDERS, J et HINXA, AJ

JUDGMENT BY:

HINXA, AJ

HEARD ON:

1 AUGUST 2016

DELIVERED ON:

15 SEPTEMBER 2016

INTRODUCTION

[1] The appellant was convicted in the Regional Court, Phuthaditjhaba, on three counts of rape and sentenced as follows:

- “a) Count 1: Life imprisonment in terms of Act 105 of 1997
- b) Count 2: Ten years imprisonment in terms of Act 105 of 1997
- c) Count 3: Ten years imprisonment in terms of Act 105 of 1997

Order: No order made in respect of Act 60 of 2000

Order: Details of the offender to be included in register for sexual offenders in terms of Act 32 of 2007.”

- [2] The appellant had on 13 December 2012 pleaded not guilty to all the charges. In his plea explanation he confirmed that he was with the complainant on the night in question but categorically denied doing anything to him.

FACTS

- [3] The complainant was at her home on the day in question when somebody knocked at ±23H00. She opened since the knocker identified himself as the appellant whom she knew as her boyfriend's friend. Whilst inside, the appellant asked for the whereabouts of one Tsotsi who stole his radio and jacket. Complainant told the appellant that the stolen items were not there, after which the appellant assaulted her with a stone three times. Complainant screamed and fell. Thereafter the appellant prayed for the rape he was about to commit, inserted his tongue and then his finger into her vagina. He then inserted his penis into her mouth. He put R200.00 in her trousers saying he was going to pay the prostitutes with it and the complainant deserved it. The appellant left at about 4:00 am. The complainant then solicited the neighbour's assistance. They took her to the hospital where she was stitched for deep wounds. The doctor noticed two and completed a medical form (J88). Though the

wounds had healed, she was still experiencing sporadic headaches.

- [4] The appellant testified in amplification of his defence. In brief he averred that he was in love with the complainant. On the day in question she informed him that her husband would be away, and he could visit her. He honoured the aforesaid invitation. On his arrival the complainant demanded R500.00 alleging she did not get her salary. The appellant offered R200.00 which the complainant ridiculed as worthless. They slept without having sex. He left very early on the following morning, only to be surprisingly arrested at ± 10:00 of the same morning for the offences under consideration.

GROUND OF APPEAL

- [5] The appeal is directed at both conviction and sentence. I will start with the grounds of appeal against conviction.
- [6] The conviction is assailed on the following grounds:
- 6.1 The court had to make a credibility finding to determine which version to accept, taking into account the totality of the evidence. The court erred in not accepting the version of the appellant and drawing a negative inference against him.
 - 6.2 The court erred in finding that the complainant was a credible witness.
 - 6.3 The J88 does not corroborate the complainant's testimony that there was genital penetration.

6.4 It was clear from the complainant's evidence that these acts all happened at the same time and were uninterrupted although it lasted for long time. Those acts were confined to the same place and happened one after each other. The court erred in finding that these acts contemplated separate acts of rape.

6.5 The court erred in finding that the State had proved its case beyond reasonable doubt.

[7] It admits of mentioning at this juncture that Adv. Maphumulo, on behalf of the respondent, vehemently opposed the appeal against conviction. I will only focus on the salient facts as I see them. In brief, he premised his case on the following grounds:

7.1 The testimony of the complainant although a single witness was clear and straightforward and could not be faltered in any material respect.

7.2 In terms of Section 208 of Act 51 of 1977 the accused can be convicted on the evidence of a single witness provided it is reliable which was the case in this matter.

7.3 The complainant did not contradict herself in any material respect and gave a good impression as a witness.

7.4 Her evidence is supported by medical evidence save for the third injury which the doctor did not observe since it was not an open wound.

7.5 The injuries from the mouth and vagina could not be inspected since the complainant was submissive and the penetration was not rough.

- 7.6 The severe injuries on the complainant's head who had just been with the appellant were compatible with rape by the appellant.
- 7.7 The appellant's version that his alleged lover could, for no rhyme or reason, falsify him in court was not reasonably possible true and was correctly rejected.
- 7.8 The complainant's account of events was corroborated by the appellant who conceded being at the crime scene.
- 7.9 The only inference to be drawn from the complainant's injuries is that the appellant violently raped her.
- 7.10 Taking into account all the probabilities and improbabilities, the complainant's version is a more probable one.

THE LEGAL POSITION

[8] If an appeal is directed against a *court a quo*'s findings of fact, the court of appeal must be mindful that the *court a quo* was in a better placed position than itself to form a judgment. When inferences from proven facts are in issue, the *court a quo* may also be in a better placed position than the court of appeal, because it is better able to judge what is probable in the light of its observation of witnesses who have testified before it. Therefore, where there have been no misdirections of fact a court of appeal must assume that the *court a quo*'s findings are correct and will accept these findings, unless it is convinced that they are wrong. (See **R v Dlumayo and Another** 1948 (2) SA 677 (AD) at 705-6).

9] Thus, in order to interfere with a *court a quo*'s findings, it has to be established that there were misdirections of fact, either where

reasons on their face are unsatisfactory, or where the record shows them to be such. See also **S v Monyane and others** 2008 (1) SACR 543 (SCA) at para [15] where the Supreme Court of Appeal stated that it is only in exceptional cases that that court will be entitled to interfere with the court *a quo*'s evaluation of oral evidence. The court stated:

“This court’s powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence show them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court’s factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court’s evaluation of oral testimony (S v Francis 1991 (1) SACR 198 (A) at 204E)”.

[10] I find all the foregoing dicta cumulatively not only apposite but also instructive in the circumstances obtaining in this matter.

[11] It admits of no doubt that the state’s case in this matter turned on the evidence of a single witness. Consequently, it is trite exposition of our law that this matter cries out for a degree of cautionary approach.

EVALUATION OF EVIDENCE

[12] I next turn my attention to the grounds of appeal; the evidence adduced, and the judgment pronounced by the court with the aforestated dicta uppermost in mind. By way of prelude, I pause to point out that, in accepting the evidence of the complainant, the *court a quo* (“the court”) warned itself of the special danger besetting conviction on the evidence of a single witness.

[13] In heeding the cautionary rule approach the court made the following observations at paras [5] – [10], page 32 of the judgment,

“The court has got to determine as to whether the evidence of such a nature, in this particular instance and as far as the complainant is concerned whether it was clear and satisfactory in every material respect and if so, in view of the fact that she has been a single witness. On itself, if clear and satisfactory in every material respect and obviously she passes the test and her evidence can be “accepted”.

[14] At paras [15] – [20] the court concluded,

“Now the complainant testified, she testified well. She was in nowhere finished out by the defense. She stood her ground in as far as the evidence relating to the various charges, three in all, is concerned. She was clear. She was coherent. She had an answer for every question and she did not in any way deviate from the version that she presented via prosecution.”

[15] In analysing the defence evidence, the court observed at paragraph 20 page 32 – paragraph 10 page 33,

“What I cannot understand is that even though the accused states that the complainant laughed at him, why then should she invite him to bed. Secondly, if she was dissatisfied with it, then that question of going to bed would not even have arisen. Thirdly, if she was falsely incriminating him because he did not give her R500.00 except R200.00 then once again the question of the bed would not have come about. Fourthly, if she was having an affair with him, right up until the day he was arrested, then the question relating to the false incrimination could never have come around”.

[16] In dismissing the defence contention that the appellant was the complainant’s secret lover and an invitee on this day the court posed the following questions,

“If she... invited you, then why would she trump up such a story against you? So, from 4:00 o’clock to 10:00 o’clock in the morning someone assaulted her, so seriously that she goes (sic) to the police, the police take (sic) her to the hospital and the doctor notes (sic): in the state of shock and crying?”.

The court then concluded,

“... and you must remember it takes too much more to have a secret love affair than a normal known affair. In other words, there would be more protection of it and favoured (sic) towards a secret lover than an ordinary lover, a day to day lover. In the light of the evidence, I will reject your version as “being false”.”

[17] At this juncture I would venture to add that the aforesaid protection of this love affair would be more called for in the case of a married woman like the complainant if she were embarking on adulterate

relationship with the appellant. A *fortiori*, perhaps not only a protection but a watertight insulation of secrecy in view of the danger attendant upon having an affair with a married woman. That is all the more so that no one had detected their “adulterate” conduct on this night, whereupon it might be assumed on behalf of the appellant that the complainant was scapegoating. Whilst on this point, it would still be inconceivable as to how would the complainant scapegoat by self-inflicting such serious injuries on the delicate part of her body, to wit, a head.

[18] I pause at this stage to observe some material and crucial discrepancies in the appellant’s canvass of events:

- 18.1 It is common cause that the appellant slept with the complainant for the whole night in question and that the latter woke up afflicted with serious head injuries on the following morning. The appellant’s testimony that he did not even notice such injuries, let alone causing them, is devoid of any credence. If anything, it tends to lend credence to the appellant’s version that the injuries were inflicted by the appellant.
- 18.2 The next question that calls for consideration is the rationale behind such infliction. Logically, the appellant could not be drawn into this question since he did not even see the aforesaid injuries on the one hand. On the other, the complainant’s account (that the injuries were a precursor to the rape) has much to commend it.
- 18.3 According to the appellant, “We were always involved in a love relationship...” (my underlining). The view I take is that by “always”, appellant sought to emphasize an intimate

relationship with the complainant, hence my underlining of “always”. Bizarrely, this version rang hollow when he further stated that from 2010 to 2012 they had sex only once. I must hasten to point out that this adds substance to the appellant’s evidence that they never fell in love.

[19] I now revert to the complainant’s testimony. She withstood the grueling cross examination by the appellant’s legal representative (“Mr. Venter”). The hereunder “question - answer” exchange between the complainant and Mr. Venter lucidly illustrates how the complainant firmly stood her ground. For the sake of brevity, I will only advert to those pertinent, as I see them:

“Q ... You asked him to come and visit... because your husband is not home

A. I never invited him.

Q. He will further testify that you asked him R500.00 because you said you did not received (sic) your salary.

A. No, that is not true.

Q. ... He did not have R500.00 because his wife is sick and pregnant ...

A. No, I never asked him for anything.

Q. ... You told him that you and him must go to bed ... to sleep.

A. No.

Q. ... he slept with you, nothing happened.

A. ... It was actually him after he had hit me with the stone who told me to undress and go to bed, after refusing to kiss him.

Q. You woke him up round about three to four

A. I never woke him up.

Q. He did not see any injuries on you. You did not have any injuries when he was there.

A. He is the one who caused me injuries ... When he arrived there I had no injuries.

Q. He will testify that he did not see any injuries because your head was covered, as it is today.

A. I was not wearing a hat on my head.

Q. He will deny that he hit you with a stone.

A. He did it, he even left the stone ... on the table.

Q. He will deny that he did all this (sic) sexual things that you testified about

A. He did everything to me”.

[20] Although a vigorous attempt had been wielded during trial; in the heads of argument; and during viva voce arguments in court against the credibility of the complainant, I am not persuaded that the court erred in its assessment of the witness. The impression produced by the aforestated “question –answer” exchange and the reading of the record in its entirety present more vividly a very credible witness in complainant.

[21] The problems plaguing the appellant’s case regarding credibility do not end here. One may do well to keep in mind that Mr. Venter who appeared on behalf of the appellant during trial conceded that the complainant “was a good witness” (See paragraph 5 page 28). Almost similar sentiments were echoed in the heads of argument that the complainant “gave her testimony chronologically” (See paragraph 4.1 page 5). Ironically, in the same heads of argument, one of the main thrusts of the argument was that “the court erred in finding that the complainant was a credible witness” (See paragraph 1.4.2 page 2). Adv. Kruger who

argued the appeal in court on behalf of the appellant found herself in an invidious situation: She had to reconcile the two diametrically opposed submissions, yet she neither represented the appellant during trial nor drafted the heads of argument. She then unpersuasively opted for the contention that the complainant was not a credible witness.

[22] I deal last on this topic with another ground of appeal which was vigorously advanced viz, separate acts of penetration linked in time and place would be less likely to be deemed separate acts of rape. This view resonates well with, and heavy reliance was placed on, the dictum of **S v Blaauw** 1999 (2) SACR 295 (W). At 300 (a-d) the court reasoned as follows,

“Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim’s body differently and then again penetrates her, will not in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against the tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape. 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" (my underlinings).

[23] I find the aforestated sentiments not only apt but also informative on the facts obtaining *in casu*. In this connection, the complainant merely testified as follows:

"When we got to the bed the accused person inserted his tongue into my vagina and also his finger (my underlining). He then told me that he cannot ejaculate so I should open my mouth so that he can insert his penis in my mouth (my further underlining). I ended opening my mouth and the accused person inserted his penis into my mouth".

[24] I now proceed to consider the aforementioned testimony in the light of Blaauw case:

Firstly, at the risk of stating the obvious, the complainant did not, even in the slightest, allude to any pause between, or any longevity of, the penetrations of her vagina with a tongue and a finger, hence my first underlining in her testimony above. This leads to an irrefutable inference of "closely connected separate acts of penetration" envisaged in my first underlining in Blaauw case (*supra*) which is suggestive of a single rape.

Secondly, the Blaauw case postulated an act of ejaculation followed by another penetration as reminiscent of an act of a separate rape. It is common cause that the appellant's separate penetration *in casu* was expressly sparked by his non ejaculation, hence my second underlinings in both Blaauw case and the complainant's testimony.

Thirdly, it admits of no doubt that the appellant, by penetrating the complainant's mouth, was dissatisfied with the initial position of vaginal penetration as he would not ejaculate. This resonates well with the reasoning in Blaauw case when the court held,

"This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against the tree".

[25] There exist merit and substance in the appellant's contention that, even if the three (3) acts of penetration were proved by the state, there was one act of rape.

SENTENCE

[26] In turning my attention to the appeal against sentence, I deem it proper to hereunder reproduce the grounds advanced:

- 26.1 Appellant is a first offender for this type of offence.
- 26.2 Appellant has good potential for rehabilitation and this alone is a mitigating factor.
- 26.3 There was no evidence of any lasting emotional trauma suffered by the complainant.
- 26.4 The court a quo did not mention any aggravating circumstances in getting to its conclusion that there were no compelling and substantial circumstances present to deviate from the minimum sentence, although the following should be considered:
 - a) Appellant brutally assaulted the complainant
 - b) Seriousness of the offence
 - c) Community interests

26.5 If the argument mentioned in the merits is accepted by appeal court, the applicable minimum sentence is ten years.

I pause to mention that the argument alluded to herein is the one of a single rape instead of three rapes, an argument which has been found at paragraph 25 *supra* to be sustainable.

26.6 If the mentioned submission on merits is not accepted it is unclear how the appellant was sentenced to life on the first count of rape as it is clear that this was a guilty finding in terms of Section 51(3) with a minimum sentence of ten years imprisonment.

26.7 Only after the third conviction on a charge of rape the applicable minimum sentence is life imprisonment. If this decision is upheld the court did not properly consider substantial and compelling circumstances.

26.8 This instance does not constitute the most serious scenario of rape and there has to be differentiation between degrees of scenarios and the court should deviate from minimum sentence.

The submissions concluded by arguing for a sentence of twenty (20) years.

[27] In his support for life imprisonment, Adv. Maphumulo for the respondent premised his contention on two grounds:

27.1 Complainant was raped more than once.

27.2 Serious injuries inflicted on the complainant during the commission of rape.

[28] This leaves consideration of the question of sentence. Pertaining to the sentence procedure adopted by the court, I must hasten to point out that there is credence in the appellant's argument that *"the court did not mention any aggravating circumstances in getting to the conclusion ..."*.

I would venture to add that the court appears to have laboured under the misconception that if an accused has been convicted of "one of the more serious offences as contemplated in Act 105 of 1997" the absence of substantial and compelling circumstances is more likely to follow than not. (See Page 37-38 of the record). This did not only amount to an irregularity but it also left out of account the salient principle of the sentencing regime that even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice (See **S v GN** 2011 (1) SACR 93 at 97d-e).

[29] The full canvass *in casu* presents more vividly that the court did not weigh any evidence in mitigation and aggravation. It simply concluded that there were no substantial and compelling circumstances warranting deviation from the minimum ordained sentence. Whilst on this point, it is timely to advert to the sentiments of Ackerman J in **S v Dodo** 2001 (1) SACR 594 (CC). At para [38] he observed,

"To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without enquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity ..."

[30] That having been said, the first question for consideration is whether this misdirection or technical irregularity on the part of the magistrate in his approach to sentencing regime dictates the setting aside of the sentence without further ado. A brief overview of the authorities is necessary.

[31] 31.1 In **R v Harmse** 1906 TS 50 at 52 Innes CJ opined that it was possible for the proceedings to be in accordance with real and substantial justice even though a rule of criminal procedure may not have been observed.

31.2 In **S v Daniel Maake**, an unreported judgment of North Gauteng Division case No. A592/86, Kriegler J, with whom Strydom J agreed, confirmed an incompetent sentence where the circumstances of the case did not warrant the setting aside thereof.

31.3 One may do well to keep in mind that in the same division, Kriegler J, with whom Van der Merwe J concurred, also refused to set aside a sentence of a fine, where the relevant legislation did not provide for a fine, in the unreported case of **S v Sipeng and Nkung**, Case No. A1125/88.

At the risk of stating the obvious, the sentence imposed in the current appeal is ordained in the enabling legislation.

[32] Directly in point, is the matter of **S v Cedars** 2010 (1) SACR 75 (GNP). At 77, para [9], Hartzerberg J, relying on Harmse case (*supra*) concluded,

“I am satisfied that the sentence was in accordance with real and substantial justice although there was a technical irregularity.”

- [33] I find the sentiments expressed by Innes CJ in Harmse’s case as valid today as they were in 1906 (110 years ago). Whilst the dictum was referring to reviews, I see no reason why it cannot be applicable to appeals also. It is unthinkable that the same irregularity may be condoned in reviews, yet held to be vitiating the proceedings in appeals.
- [34] The next question is whether the sentence imposed accorded with real and substantial justice or is shockingly excessive. It is beyond question that the sentencing court should impose an appropriate sentence based on all the circumstances of the case, and should reflect the severity of the crime, the blameworthiness of the offender, and serve the interests of the society. (**S v Zinn** 1962 (2) SA 537 (A)).
- [35] The abuse of women in this country has assumed tremendous proportions. As the Constitutional Court put it in **F v Minister of Safety and Security** 2012 (1) SA 536 CC in paragraph [56]:

“The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity. This is so

despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl children.”

[36] The offence with which the appellant was convicted of is governed by the provisions of Section 51 of the Minimum Sentence Act, and Marais JA reminds us in **S v Malgas** 2001 (1) SACR 469 (SCA) in paragraph 25 that,

“Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed, and that if there is sufficient basis for deviation from imposing the prescribed minimum sentence, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed, paying due regard to the bench mark which the legislature has provided”.

[37] In this matter the rape was accompanied by a serious attack on the victim with a dangerous weapon (stone) on the delicate part of the body (head). This act on its own is punishable by life imprisonment as it resorts under Part 1 Schedule 2 of the Act.

The problems surrounding aggravation afflicting the appellant's case at the helm of the presented evidence did not end here. The whole saga unfolded at the complainant's place from ± 23H00. This triggers a vexing question as to where will the women in this country be tightly secured if not at their places of residence. It is despicable and disquieting that few of our women dare to venture alone into their residences. The appellant penetrated the complainant three times, inclusive of a mouth penetration with his

penis, which must have been, to put it as mildly as I can, traumatic and must still be rekindling memories of such trauma.

[38] Taking into account all the circumstances of this case, I am of the view life imprisonment would be appropriate.

[39] In the result, I propose the following order:

- 1) The appeal against convictions on three (3) counts of rape and three (3) consequential sentences imposed succeeds.
- 2) The three convictions and three sentences are set aside and substituted with the following:
 - a) The appellant is convicted on one count of rape.
 - b) The appellant is sentenced to life imprisonment.
- 3) Orders made in terms of Act 60 of 2000 and Act 32 of 2007 are confirmed.

M. D. HINXA, AJ

I agree.

C. REINDERS, J

On behalf of the appellant: Adv. S Kruger
 Instructed by:
 Legal Aid South Africa

BLOEMFONTEIN

On behalf of the respondent: Adv. RB Maphumulo

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN