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**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 27/2016**
DATE HEARD: **23/05/2016**
DATE DELIVERED: **03/06/2016**

In the matter between:

OLEBOGENG GABORONE

Appellant

and

THE STATE

Coram: Olivier J et Pakati J

JUDGMENT

Olivier J:

- [1.] The appellant was convicted in the Regional Court on two charges of rape (counts 1 and 2), kidnapping (count 3) and robbery (count 4). He was sentenced to 15 years imprisonment on each of the two counts of rape, 2 years imprisonment on count 3 and 1 year imprisonment on count 4, but it was ordered that all the sentences be served concurrently. This appeal is against the convictions only.
- [2.] It is trite that a court of appeal will not readily interfere with the factual findings of a trial court. It will, however, do so where it is clear from the record, and therefore from the same evidence that served before the court *a quo*, that those findings are wrong¹. It has to be kept in mind though “*that an entirely uncritical approach to the factual findings of the trial court will render appeals on fact illusory*”².
- [3.] The complainant testified that she had on the particular morning gone to school to collect her report. On her way back, while drinking water in a park, she was accosted by the appellant. He told her that he had on some earlier occasion bought her liquor and he demanded to have sexual intercourse with her. She denied knowing him. He grabbed her by the hand. He walked with her to a soccer field, where he took her umbrella. She tried to get away, but he held her by her right hand.

¹ **S v Monyane and Others** 2008 (1) SACR 543 (SCA) para [15]

² **RH v DE** 2014 (6) SA 436 (SCA) para [5]

- [4.] It was at that stage that she noticed the witness K. among a group of school children who were passing nearby. She called him and asked him to tell the appellant to let go of her. When K. wanted to talk, the appellant told him to stay out of his business and threatened to hit him with the umbrella. K. asked her whether she knew the appellant, and she said no. K. again attempted to persuade the appellant to let her go, but eventually left. This was at around 12 o'clock that morning.
- [5.] The appellant then took her to a spot in an open space near a school. He tried to slap her, but missed. He then "*dropped*" her to the ground, and removed her shoes and t-shirt. When he wanted to remove her pants, she refused. He then "*trampled*" on her head. She told him that she would tell her mother. When she screamed the appellant threatened to kill her. She said to him "*so who are waiting for, why do you not just kill me right now*". When the appellant threatened to "*stab*" her with a stick, she again asked him what he was waiting for. He then slapped her, took off her pants and raped her. When he threatened to kill her she again challenged him to go ahead.
- [6.] "*After he was done*" the appellant kept her t-shirt, but ordered her to put her pants and shoes back on. He then took her to a spot near the hostels. On the way there she was scratched by bushes, and the appellant "*stabbed*" her with a stick on her arm. Again she ducked

when he tried to slap her. He removed her pants and raped her again.

[7.] The appellant then ordered her to put her pants back on and told her that they were going to his maternal home so that he could change clothes. On their way there he held her hand.

[8.] At the particular house the appellant's "*grandmother or mother*" opened the gate for them. She asked the complainant who she was and where she stayed, and the complainant answered both questions.

[9.] When they left there the appellant told her that they were going to the so-called Chisanyama, apparently a place people frequent to barbeque. She refused to go there and demanded her umbrella. The appellant returned her umbrella and told her that they were instead going to sit in a park.

[10.] At the park she told the appellant that she was going to buy airtime at the shop. She then escaped through the premises of other people and went home. She felt a burning sensation in her private parts.

[11.] At home she went to lie down, but her sister saw her and she was then taken to her aunt, Mrs E. A.. She told Mrs A. what had happened. The matter was then reported to the police and later that day the complainant was examined by a nurse at the clinic.

Thereafter she accompanied police *“to point out the scene to them”*, and photographs were taken.

[12.] She also pointed out the house where the appellant had taken her. They found an elderly lady there, but the appellant was not present.

[13.] When the appellant was arrested about a week later, the police took the complainant to the police station, where the appellant was brought to her and she was asked to identify him as the person who had attacked her.

[14.] In the medical reports scratches, bruises and redness on an arm of the complainant and a bruise on her ear were recorded, as well as the fact that she experienced tenderness on the right side of her head, all of which would basically have been consistent with the complainant’s description of the assault on her.

[15.] Furthermore, it was recorded in the medical report that there was a tear at the 6 o’clock position of the posterior fourchette, which *“corresponds with forceful vaginal penetration”*.

[16.] The witness K. confirmed having come across the complainant and the appellant that day, and Mrs A. confirmed that the complainant had reported to her that she had been raped.

[17.] The appellant’s version was a denial of having come across the complainant that day at all, and of knowing her.

- [18.] On the evidence referred to up to this point one would have to say that a strong case had been made out against the appellant. Closer scrutiny, however, creates substantial, and indeed reasonable, doubt of the appellant's guilt.
- [19.] The issue was not really whether the complainant had been assaulted and possibly also raped, but rather the identity of the person responsible for that. The question was not whether the complainant may have mistakenly identified the appellant as the attacker. The incident happened in broad daylight and, at least on the complainant's version, over a protracted period of time.
- [20.] The issue was therefore not the reliability of the complainant's identification, but rather the credibility thereof, and on a conspectus of all available evidence one is unfortunately left with an uneasy feeling that all was not as it appeared at first blush.
- [21.] In her police statement the complainant made no mention at all of K.. I am aware of the fact that police statements are notorious for their lack of detail, and for inaccuracies³. However, having regard to the crucial role that K. had on the complainant's version played in the events of that day, it is rather strange that she would not immediately have told the police about K., and of the fact that he could confirm the events, at least up to a point, and also the identity of the attacker.

³ Compare **S v Rautenbach** 2014 (1) SACR 1 (GSJ) para [128]

- [22.] There were material discrepancies and inconsistencies in the evidence of the complainant and K., and between the evidence and the statement of K..
- [23.] In his police statement K. claimed to have witnessed the appellant slapping the complainant. On the complainant's version the appellant had never slapped her, or even attempted to do so, in the presence of K.. In his evidence K. conceded that his police statement was wrong on this and that he had never seen the complainant being slapped.
- [24.] In fact, although K. confirmed that the complainant had asked him to tell the appellant to let her go, everything appeared to him to be normal between the two of them. So much so that, when he asked the complainant whether the appellant was her boyfriend, she, according to him, just smiled. There is furthermore no room in K.'s evidence and version for the appellant to have threatened to hit him with an umbrella. According to K. he left the appellant and the complainant behind, because he noticed nothing strange or alarming at that stage. K.'s version is completely irreconcilable with the complainant's version of a forceful kidnapping.
- [25.] K. said the complainant and the appellant were in a busy street when he came across them. This raises not only the question why the complainant had asked only him for help (as opposed to having screamed for help), but also the question why the appellant would

have been so brazen as to grab and kidnap the complainant in broad daylight and in a busy street, for all to witness.

[26.] Another troubling aspect of K.'s evidence is that, although he agreed that the events occurred at around noon that day, he also testified that he had in fact accompanied the complainant halfway to her school that morning at around as early as 8 o'clock. This is simply irreconcilable with the complainant's version, which left the impression that she had collected her report and was on her way back when she was accosted by the appellant. There would on the complainant's version be no explanation for her whereabouts during that period.

[27.] On her own version the complainant had ample opportunity to scream for help when the appellant took her to his house from the second rape scene. Initially her explanation for her failure to do so was that she had been too scared to scream. This would be difficult to reconcile with the picture that she had painted of her repeatedly challenging her attacker to carry out his threats. Later in cross-examination she testified that she had indeed tried to scream, but had then kept quiet when the appellant threatened to hit her.

[28.] Why would the appellant have taken her to his house, after having violently assaulted and raped her, and allow the woman at his maternal home to see the complainant, especially if she had at that stage been without her t-shirt and with visible physical injuries?

The complainant significantly also failed to mention in her statement that the appellant had taken her to his house.

[29.] And why did the complainant not ask the woman at the house for help? Instead they seem to have had a normal conversation; certainly not the type of conversation one would expect between, on the one hand, an elderly woman who is unexpectedly confronted with the sight of a strange half-clothed and injured woman on their premises and, on the other hand, a young woman who had just been kidnapped, beaten up and raped twice. The complainant's evidence that she was too heartbroken to ask the woman for help, makes no sense in circumstances where she had on her own version had a conversation with the woman.

[30.] There was furthermore no evidence by the investigating officer as to whether any attempt had been made to obtain a statement from the woman the police met when the complainant pointed out the appellant's house to them. It is not clear whether that woman was the same person that the complainant had according to her spoken to earlier but, if not, there was no evidence that attempts had been made to trace the woman the complainant had spoken to.

[31.] Why would the appellant, who had until then not tolerated any resistance by the complainant, have been quite happy to forget about going to the Chisanyama?

- [32.] Why would he have returned her umbrella, if he had intended to rob her of her belongings? Why did the complainant not also at that stage ask for the return of her t-shirt?
- [33.] The alleged report to Mrs A. is not really relevant, because the issue never was whether the complainant had consented to sexual intercourse, and it is trite that such a report cannot serve as corroboration of a complainant's evidence of rape⁴.
- [34.] Mrs A.'s evidence in any event contradicted her police statement. In the statement she said that she had never looked at the complainant's clothes when the report was made to her, but in her evidence she said that she had noticed that the complainant's clothes were dirty. This too is a clear contradiction. It cannot be dismissed as a mere inaccuracy, and certainly not as an issue of lack of detail.
- [35.] The complainant never mentioned two rapes, at two different scenes, to Mrs A. or to the police photographer; only one scene and, therefore, only one rape.
- [36.] Perhaps the most concerning aspect though was the fact that the appellant was excluded as the donor of the semen found in the complainant and on her panty. When confronted with this in cross-examination the complainant testified that she had sexual intercourse with her boyfriend the night before. This was consistent

⁴ Compare **S v Gentle** 2005 (1) SACR 420 (SCA) para [19]; **S v Hammond** 2004 (2) SACR 303 (SCA)

with what she had according to the medical report told the nurse who examined her.

[37.] The problem is, however, that the prosecution failed to present evidence that semen deposited during intercourse the previous night would still have been traceable in the complainant's body the next afternoon. It may indeed be the case, but a court cannot make such a finding in the absence of evidence to that effect.

[38.] According to the complainant the appellant had not used a condom, but she maintained that he had never ejaculated inside her. At that stage of cross-examination there was a problem with the recording of the evidence, but it appears as if the complainant testified that she had not felt the appellant ejaculating. If that had indeed been her evidence, it would be difficult to reconcile with the complainant's evidence-in-chief that the appellant had forced her to the second rape scene "*After he was done*" at the first rape scene.

[39.] Why was the DNA-profile of the complainant's boyfriend not compared with that of the semen found in and on the complainant? If it was a match, it may have gone a long way towards corroborating the complainant's version, although there would still have been the problem that there was no evidence as to when the tear in the posterior fourchette had been caused, leaving the possibility open that it may have been caused by the same person whose semen was found. The judgment of the Regional Magistrate

makes no mention of this issue, leaving one with the feeling that it may never have been considered.

[40.] While there certainly is in my mind strong suspicion that it is the appellant that had attacked and raped the complainant, be it once or twice, the plethora of discrepancies and improbabilities leave one with the distinct feeling that there may have been more to this matter than meets the eye; as does the failure on the part of the police and the prosecution to address the issues referred to above.

[41.] It left open, *inter alia*, the reasonable possibility that the appellant had not been the one who caused the tear in the posterior fourchette of the complainant.

[42.] There was in any event no evidence that the presence of a tear in that position of the posterior fourchette would be indicative of forceful intercourse. The medical report was handed in after the appellant's representative indicated that there was no objection to it being handed in. The nurse who had examined the complainant was never called to testify to explain about when the tear could have been sustained, and to motivate and explain the conclusion of forceful vaginal penetration. This procedure has often before been criticised⁵ and courts have repeatedly been warned not to make inferences from such findings without proper expert evidence⁶. The unsubstantiated and unexplained conclusion of the nurse did

⁵ Compare **S v MM** 2012 (2) SACR 18 (SCA)

⁶ Compare **S v Melrose** 1985 (1) SA 720 (ZS)

not constitute such evidence, simply because, in the absence of an explanation of the grounds and reasons for that conclusion, it remained just that; an unsubstantiated opinion which the Regional Magistrate was not entitled to accept without more in the circumstances⁷.

[43.] *“... in the search for truth it is better that guilty men should go free than that an innocent man should be punished. ... If then the police do not fully and properly investigate crimes, ..., as a result of which insufficient evidence is made available to the prosecution and in consequence put before the Court, guilty men will go free, not because of the existence of the rule to which I have referred, but simply because cases have been inadequately investigated”*⁸.

[44.] In my view the appeal should succeed and the following order is therefore made:

THE CONVICTIONS AND SENTENCES ON ALL FOUR COUNTS ARE SET ASIDE.

⁷ Compare **S v Baleka and Others (3)** 1986 (4) SA 1005 (T); **Stacey v Kent** 1995 (3) SA 344 (E) at 350G; **Van Pletzen v Van Pletzen** 1998 (4) SA 95 (O) at 100F

⁸ **S v Kubeka** 1982 (1) SA 534 (W) at 538H

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

B M PAKATI
JUDGE
NORTHERN CAPE DIVISION

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