

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA & R 50/16
Heard on: 25/07/2016
Delivered on: 16/09/2016

In the matter between:

JOHN WATERBOER

APPELLANT

AND

THE STATE

RESPONDENT

Coram: Pakati J et Mamosebo J

JUDGMENT

MAMOSEBO J

- [1] The appellant, Mr John Waterboer, was convicted in the Kimberley Regional Court on six counts of rape, one count of attempted rape and

one count of robbery. The Regional Magistrate, Mr DF Schneider, took all six counts of rape together for purposes of sentence and imposed a sentence of life imprisonment; six months imprisonment for assault and two years' imprisonment for theft. The appeal is against the conviction and sentence on the rape counts only. The Regional Magistrate had already informed him when imposing sentence that he qualified for automatic appeal in terms of s 309B of the Criminal Procedure Act, 51 of 1977 (CPA). In addition, the appellant also applied for condonation for the late filing of the appeal.

- [2] The first issue is whether the sexual intercourse between the appellant and the complainant was consensual. The second issue is whether life imprisonment was an appropriate sentence.

The condonation application

- [3] The appellant was sentenced on 07 May 2015. He filed his application for condonation and the Notice of Appeal on 09 December 2015, approximately 7 months after he was sentenced. Although he and his legal representative were aware on the same day when sentence was imposed that he qualified for automatic appeal, he raised the following as reasons for the late noting of an appeal:

- 3.1 He was transferred from Tswelopele Correctional Centre in Kimberley to Mangaung Correctional Centre in Bloemfontein;
- 3.2 After his transfer he lost contact with his attorney of record;
- 3.3 His attorney only learned on 21 September 2015 that he was at Mangaung Correctional Centre. There is no explanation for the delay from 21 September after the attorney had become aware of the appellant's whereabouts; and

3.4 The reason for the delay was because he had not consulted with his attorney.

- [4] Condonation is not to be had for the asking. It is trite that the explanation for the delay must cover the entire period of the delay and must be reasonable. See *Minister of agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at 117 (para 35). Despite the fact that the explanation furnished by the appellant did not cover the entire period, Ms Mabaso, counsel appearing for the respondent, did not oppose the condonation application. There will not be any prejudice if the application is granted. We condone the appellant's late filing of the application. This should however, not be used as a precedent for future applications. The delays must be adequately explained.

The merits on conviction

- [5] The appellant pleaded not guilty on all the six counts of rape. In his plea explanation he admitted formally in terms of s 220 of the CPA, to having had sexual intercourse with the complainant on the six occasions but pleaded that it was consensual. Therefore the only element that the State needed to prove was whether there was consent or not.
- [6] The complainant, Ms R C, originally from Cape Town, was a trainee at Mohawk Spur, Kimberley. On 28 February 2015 she reported for work at Spur at 16h30. Her shift ended around 24h00. She had been on her feet since 16:30 and must unquestionably have been exhausted. There was an arrangement between her and her fiancé, Mr Lumburg, to fetch her from Mohawk Spur. Mr Lumburg did not show up. It is common cause that she left the building and the parking area and moved towards the main road. She was approached at knife point by the appellant and ordered to

walk along and not to scream or else her eyes will be gouged out and tongue cut out. She obliged.

- [7] The appellant then produced condoms and enquired from her what they were and whether she knew what they are used for. She did not respond and the record reflects that she was emotional. He ordered her to walk and they did so moving towards a certain train bridge where he ordered her to climb over a wall depicted on photo 2 of Exh A. She remained calm and complied with his instructions. Once they were over the wall and in a bushy stinking area between the bridge and the railway line, observed on photos 3 and 4, the appellant pulled down her jeans and also removed his pants. He inserted a condom and ordered her to lie down on some branches on the grass where he repeatedly raped her; about three times. During the last encounter they were in a standing position.
- [8] After the third copulation the appellant ordered her to get dressed. They walked until they reached a squatter camp where he undid a corrugated sheet on the side of a shack and claimed that he was not in possession of the key to unlock the door. Although he wanted her to enter first she persuaded him to do so, which he did. She followed. It was pitch-dark in that room. Photo 20 depicts a clear picture of the inside of that room. The corrugated sheets making up the structure of this dwelling are severely run-down. There is a torn piece of cloth material hanging on the side probably creating the feel of a curtain on the wall. The piece of furniture depicted on photo 20 is an old metal bedstead with metal legs partially covered with a floral blanket and other small items. The complainant was raped, she says, another three occasions on the bed. He then listened to music on his cellphone and fell asleep. The knife was there all along where she could see it.

- [9] At dawn, he walked her towards the direction of her home. Once she became familiar with the location where she was, they parted ways. She saw her children walking to the shops. She shouted for them. Her eldest daughter telephoned Mr Lumburg who joined them soon. She made the first report to him. She was taken to a doctor who examined her. She did not sustain physical injuries but only felt abdominal pain and her private parts were also painful. The examination revealed that she was pregnant. She mistook the pregnancy to be the product of rape and immediately had the pregnancy terminated through an abortion.
- [10] Since this incident the relationship between Ms RC and Mr Lumburg was strained. She has returned to Cape Town and has abandoned the idea to reside in Kimberley. Their plans to get married have been scuppered and their plan to buy a home at Roodepan was accordingly abandoned. Ms Campbell says she now does not trust men in general since the incident. Her own father and two brothers have not been spared. She also suffers from sleepless nights.
- [11] Mr Lumburg testified that he resides at De Beers. He met the complainant in Cape Town while studying at the University of Cape Town. They have been in a romantic relationship for ten years. They were looking for a joint home because the complainant was intending to stay with him permanently. On the fateful evening when he went to pick her up she had gone. He enquired from his sister who was a manager at Spur if she was aware of her whereabouts but she was not. His concern led him to drive around Kimberley searching for her well aware that she was unfamiliar with the place. He drew a blank at Kimberley hospital and even reported her missing at the police station. In the morning he returned to the Spur and still did not find her. While still searching he received a call from his

daughter informing him that her mother is home. That is when he received the report about the rape from the complainant.

- [12] Ms Karen Lumburg-Deerling, senior manager at Mohawk Spur, Mr Lumburg's sister, also testified. She confirmed that the complainant was in training at Spur and had reported for work at 16h30. When her brother arrived he did not find her at Spur. Ms Lumburg-Deerling confirmed that after the incident the complainant became withdrawn and after two months returned to Cape Town.

The State closed its case whereafter the defence also closed its case without leading any evidence.

- [13] During cross-examination, Mr Hanise who appeared for the accused at the trial, asked the complainant why she did not use the opportunities to escape when the appellant was asleep that evening. Her explanation was along these lines: She came from Cape Town and was not familiar with Kimberley, particularly the area where she was taken. She feared to be stabbed or killed. She was threatened with a knife. From the stage when she was forced to climb over the wall she says she told herself (as though in silent prayer): "*Here gee vir my kalmte dat ek reg kan dink.*" She was also asked why she did not seek help the following morning as the appellant walked her into town. She said she feared for her life. Mr van Tonder, for the appellant, conceded that the complainant's responses are quite evident that she was afraid of the appellant.

- [14] The complainant testified that "*hy het gesoen hy het alles wat 'n mens doen as jy omgang het, het hy gedoen.*" When asked whether she kissed him back her response was: "***I had to.***" The defence argued that there cannot be talk of rape. This submission, in my view, is incorrect. The

response “I had to” portrays a situation where the victim does not have a choice. It cannot be argued that just because he kissed her that qualifies or supports the appellant’s defence of consent.

[15] The defence raised the following contradictions in the evidence of the complainant:

(15.1) That in her written statement she said she gained access through the window and in court she said the appellant removed a side panel of the shanty;

(15.2) That the appellant held her by her hand while entering the shack whereas she disputed having said that while testifying in court;

(15.3) She testified that her fiancé was supposed to pick her up at the Spur restaurant at 24h00 whereas her fiancé’s testimony was to the effect that he was to pick her up at 22h00.

The defence has conceded, correctly so in my view, that the contradictions are not material. I should add that they did not affect the complainant’s credibility. See *S v Mkhohle* 1990 (1) SACR 95 (A) at 98f-h and *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e – 594h.

[16] A good starting point would be with the instructive remarks by Langa DP in *S v Boesak* 2001 (1) SACR 1 (CC) at 11E- F (para 24) pertaining to the failure by the accused to testify where there is evidence before court which calls him to answer:

“[24] The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage

*when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal* [1998 (2) SACR 493 (CC); 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC)], when he said the following:*

‘Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.’

- [17] Mr Schneider, the Regional Magistrate, had only the evidence of the complainant pertaining to the rape upon which he had to consider the guilt of the appellant. She was a single witness and her evidence required to be treated with caution. Section 208 of the CPA provides that an accused may be convicted of any offence on the evidence of any single

competent witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects in the evidence. See *S v Sauls* 1981 (3) SA 172 (A) at 180E – G. Presiding Judicial Officers must also cleanse themselves of the temptation of introducing the outlawed cautionary rule that women are predisposed to be unfaithful, and require absolutely that their evidence be corroborated in every case. See *S v Jackson* 1998 (1) SACR 470 (SCA) at 476c – 477e.

[18] Tellingly, she had a lot to lose as compared to the appellant. One would even say a bright future was unfolding before her. She was engaged to be married; the couple was making plans to buy their first home, her three children, whom she adored and refers to as “her babies”, were finding stability in terms of being in a complete home comprising a mother and a father and she was in training for a job. She was building a future for her children. Unsuspecting, the complainant had also conceived and was going to have a baby whose life had to be terminated before it even started. If I compare the aforementioned circumstances and weigh them against those of risking being in a one night flirtatious consensual sexual intercourse stand with a complete stranger all the circumstances militate against consent. The venue for copulation out in a bushy grassy stinking area and later in the filthy room depicted on photo 20 was so demeaning that complainant on viewing it may well have withdrawn her initial consent.

[19] The magistrate found that there was not much criticism, if any, that could be levelled against the evidence of the complainant. This was confirmed by Mr van Tonder correctly conceding as follows: “*In view of limited*

amount of criticism which can be levelled against the evidence of the complainant, as well as the fact that the appellant elected not to testify, I find it difficult to formulate convincing arguments as to why his convictions should be set aside.”

- [20] The defence by the accused that the sexual intercourse was consensual is blatantly false and without merit. I could find no misdirection by the Regional Magistrate pertaining to the assessment of the evidence on conviction. The appeal in this regard must therefore fail.

On sentence

- [21] The appellant was charged with rape read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. The charge sheet explicitly stated that the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the minimum sentencing legislation) applied to the counts of rape.

Section 51 stipulates:

“Discretionary minimum sentences for certain serious offences –

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 Schedule 2 to imprisonment for life.”

Schedule 2 provides-

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

(a) When committed –

- (i) *In circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice.”*

[22] The Regional Magistrate took the following factors into account: The personal circumstances of the appellant and whether there is a possibility that he may rehabilitate; the interests of society and the seriousness of the offences of which he had been convicted. The Court was alive to the fact that the legislature has ordained life imprisonment unless substantial and compelling circumstances were found to be present.

[23] The following personal circumstances were taken into consideration by the Regional Magistrate:

The appellant was 31 years old and had passed standard 8 at school. He is unmarried. Before his incarceration he was involved in a love-relationship with Ms Ursula McGulty, who testified in aggravation of his sentence. She is the mother of his two minor children. He is not the primary caregiver to these minor children. He was in custody awaiting finalisation of his trial for a period of 14 months.

[24] Concerning the six counts of rape, the Court viewed them in a very serious light. It accepted that the ordeal must have been extremely traumatising particularly because it lasted from Friday night into Saturday morning. Noting that she did not sustain any physical injuries during the rape itself the Court accepted that she was repeatedly raped at knife-point. The trauma experienced by the complainant caused her own wedding plans to flounder. She also had to leave Kimberley and took a conscious decision that she will never reside in Kimberley ever again.

Ponnan JA found that the age of an accused who is a major is a neutral factor. See **S v Matyityi** 2011 (1) SACR 40 (SCA) at 48. Also see **S v Dlamini** 1991 (2) SACR 655 (A) at 666a - e.

- [25] The tone when dealing with the rape cases was set by Chief Justice Mahomed's pronouncements in **S v Chapman** 1997 (2) SACR 3 (SCA) at 5b-c:

"This in our view is a correct approach. Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. 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 the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

- [26] In **S v Malgas** 2001 (1) SACR 469 (SCA) at 482e Marais JA remarked:
- "I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence,"*

- [27] The Regional Magistrate considered the circumstances in totality weighing all factors together and found that there were no substantial and compelling circumstances to warrant a deviation from the prescribed

sentence of life imprisonment. The rape has impaired the dignity of the complainant and shattered her life. As stated by Mahomed CJ women in this country must be able to enjoy the benefit and protection of the law. They must be able to go and come from work without fear.

[28] I can find no irregularity or misdirection on the part of the Regional Magistrate. The sentence is also not disturbingly inappropriate. There was no reason for the Magistrate to deviate from the prescribed sentence for flimsy reasons. In my view, the appellant is fortunate to get away with one life sentence. Two life imprisonments should have been imposed. There was a first series of three rapes in the bush followed by a second series of three rapes in the dilapidated shack. See *S v Blaauw* 1999 (2) SACR 295 (WLD). It follows that the appeal against sentence must also fail.

ORDER

1. In the result, the appeal against the conviction and sentence on the six counts of rape is dismissed.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

I concur

PAKATI J

NORTHERN CAPE HIGH COURT

Appearance:

For the Appellant :

Mr A van Tonder

Instructed by:

Justice Centre, Kimberley

For the Respondent:

Adv J Mabaso

Instructed by:

Office of the Director of Public
Prosecutions