



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, (PRETORIA)

2/3/15

CASE NO: A410/14

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

2 MARCH 2015

[Signature]

In the matter between

MARUTLA, SAMUEL

APPELLANT

And

THE STATE

RESPONDENT

J U D G M E N T

MUDAU AJ:

[1] The appellant, Mr Samuel Marutla, appeared before the regional court magistrate, Pretoria, on a number of charges that include robbery with aggravating circumstances, rape and kidnapping. After a trial that lasted a few days, he was convicted only in respect of the rape and kidnapping charges. Consequently, he was sentenced to eight (8) and two (2) years respective terms of imprisonment. The trial court however, ordered that both sentences be served concurrently. The effective sentence is therefore 8 years

imprisonment. In addition, the appellant was declared unfit to possess a firearm. The appeal is against conviction only with leave of the court below.

[2] The sole issue for determination by this court is whether the identity of the appellant as the perpetrator of the crimes he was charged with was properly evaluated by the trial court. The fact that the crimes were committed has not been disputed or seriously challenged and can therefore be accepted as common cause. The State in essence relied on the version by the complainant and her boyfriend, which is the only evidence implicating the accused in the commission of the crimes. The accused denied knowledge of or having committed any of the crimes and raised an alibi to which I shall revert in due course.

[3] The salient facts of this matter, which are not in dispute, are the following. On 26 July 2009, the appellant, N M, and at about 18H30 was walking down a street in Mamelodi with her boyfriend. The latter was accompanying her home. Two men approached them and forced the complainant into a car parked nearby. She only knew one of them before the incident. When the boyfriend tried to intervene on behalf of the complainant, he was threatened and told to keep away. The complainant was driven away by the two men and taken inside a room at the Mamelodi hostel. Inside the room was another man on a separate bed who was then excused. Only a candle provided lighting inside the room. Of the 2 men who forcibly took her against her will, the driver of the car in which they travelled, also left the room. The driver was the man she knew as Ntebe. She remained with the man armed with a gun. At gunpoint, she was forced to take off her sweater, whereas the man took off her pants and underwear. She was made to put her hands on top of the bed as the man penetrated her vagina from behind with his penis after putting a condom on. The rape was painful and took approximately 30 minutes.

- [3] Ntebe later returned and took her together with his other friend, at the request of the latter, to Denneboom to buy electricity. As Ntebe's friend was buying electricity, she had remained inside the car with Ntebe. It was at that point that metro police officers arrived in a vehicle and asked Ntebe why he had parked his vehicle the way he did. She took that opportunity to get out of the car in which she was and went to the Metro police to report the incident. Ntebe fled the scene and left his car. She was taken to the police station where the matter was formally reported. Police went with her to the scene where the rape took place. However, the rapist escaped from the room through the window. There, a firearm with 2 rounds of ammunition was seized underneath the pillow of the bed where the complainant was raped. It is common cause that, the next day police also seized a further 39 rounds of ammunition.
- [4] It is common cause that no identification parade was held regarding this matter before the trial was conducted. Before court, the complainant identified the appellant as one of the 2 men who forced her into the car on the day of the incident. A crowd had gathered by the time she was being taken away, but this did not stop the two men. It is her evidence that the appellant was the man who raped her. Further that a firearm was produced and used to threaten her boyfriend not to interfere. She was aided in her identification of the appellant by moonlight during the initial stages of the incident. Inside the car that was used to drive her away, she was forced to sit at the back seat with the appellant. It was at that stage that she got to know the appellant by his nickname, Mashabane, as the 2 men addressed each other by their names. According to her, the candlelight inside the room where the rape occurred was sufficient for her to make a positive identification of the appellant. During cross-examination, she maintained this version.
- [5] In her statement to the police, the complainant had described the rapist as "dark *and short*". It was suggested to her during cross-examination that the appellant's complexion is lighter than that of prosecutor, which she confirmed. She maintained however, that she was not mistaken about the identity of the

appellant. She further explained regarding her statement that the police officer, who took it down, was not conversant in her language, which is Xhosa. She was under the circumstances requested to make her statement, in English which explains some of the discrepancies in the said statement.

- [6] The complainant's boyfriend, Mr Samuel Tloubatla, testified and essentially confirmed her evidence with regard to how the events unfolded. He confirmed that the appellant, whom he knew before as Mashabane, was one of the two men who forcibly took the complainant away. He also knew the second man, Ntebe, as a local taxi driver, who uses the same car involved in the incident as a taxi. The appellant's well-known in the area by his nickname, Mashabane. It is further his version that not only did the two men push the complainant but they slapped her as well. This is consistent with the J 88 report wherein it is noted that she had bruises on her face.
- [7] Mr Tloubatla further testified that although he heard reference to a firearm, contrary to what the complainant testified, he was not pointed with one. He however, and for that reason, believed that they had a firearm although he never saw it.
- [8] This body of evidence was met by a bare denial by the appellant. Not only did the appellant denied that he was at the scene, he denied that he knew the state witnesses, or for that matter, Ntebe. It is the appellant's version that he stays at an address in phase 1, Waterkloof, contrary to an address reflected on the J 15 as number 13 Mamelodi hostel. He was asked whether it is a coincident that the complainant was raped at the hostel and the address given is the same he responded:

"I do not deny that fact but the person who brought the police to the hostel is not the complainant. He is the person whom I am staying with at face (sic) 1. He is the one or pointed out the police to me".

This statement on its own, suggests that the appellant was at the said hostel at some point in time. He however, did not expand his version in this regard. He admitted that he was also known as Mashabane, the name that both state witnesses also knew him by.

- [9] The alibi raised by the accused must be considered, not in isolation, but in the context of the totality of the facts of this matter. *S v Trainor* 2003 (1) SACR 35 (SCA) para [8]–[9]; *Crossberg v S* [2008] ZASCA 13; [2008] 3 ALL SA 329 (SCA) para [121]). In *Sithole v S* (868/11) [2011] ZASCA 85 (31 May 2012), the Supreme Court of Appeal held:

“A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.”

The correct approach is set out in the following passage from *Mosephi and others v R* LAC (1980 – 1984) 57 at 59 F-H:

“The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed

and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees (Quoted with approval in S v Hadebe & others 1998 (1) SACR 422 (SCA) at 426f – h; see also S v Mbuli 2003 (1) SACR 97 (SCA) para 57)."

- [10] A little over 60 years ago, in R v Biya 1952 (4) SA 514 (A) at 521C-D Greenberg JA said:

"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'."

- [11] In this matter, the court *a quo* was alive to the fact that with regard to the actual rape, the complainant remains a single witness whose evidence of necessity had to be treated with the necessary caution. However, the court found that the probabilities were in favour of the complainant with regard to the question of identification that although it was getting dark, she sat in close proximity inside the car with the appellant. In addition, not only was she aided by moonlight, the candlelight was sufficient inside the room where the rape occurred. It is clear that the trial court took into account the cautionary approach with regard to the question of identification as alluded to by Holmes JA in S v Mthetwa 1972 (3) SA 766 (A) at 768A-C. (S v Ngcamu 2011 (1) SACR 1 (SCA) para 10 and Mohammed v State (605/10) [2011] ZASCA 98 (31 May 2011) para 5).

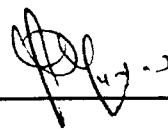
- [12] The court *a quo* also found that the evidence of the complainant was materially corroborated by the evidence of her boyfriend who placed the

appellant at the scene of crime regarding the kidnapping charge. It is inherently improbable that the lead characters would have exchanged hands under the circumstances. The probabilities are that the same men who kidnapped the complainant were with her until the police came into the picture. The contradictions alluded to in the version by the witnesses when the events unfolded are with regard to detail and not central to the material issues regarding the incident. This is borne out by the fact that the complainant never mentioned in her testimony that she was slapped, yet her boyfriend did, as supported by the medical report. She saw that the appellant had pointed her boyfriend with a firearm and yet he only heard reference to a firearm being made. This cannot constitute a material contradiction regard being had to the fact that a firearm was later found by the police on a bed on which the complainant was raped.

- [13] The appellant's alibi lacks detail. Neither is the alibi supported by any objective facts. The only inference that can be drawn from the appellant's failure to advise the police, at the earliest available opportunity and also during his bail proceedings is that the alibi had no truth in it at all (*Thebus and Another v S (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003)*). As against the good qualities of the state's case, the accused's bare denial cannot stand and it was in my respectful view, correctly rejected as false by the trial court.

- [14] In the premises, I propose the following order:

1. The appeal against conviction is dismissed.



MUDAU TP
ACTING JUDGE OF THE HIGH COURT