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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

Case Number: A576/2014

In the matter between:

THABO PETRUS MOLATLHEHI

Appellant

and

THE STATE

Respondent

JUDGMENT

POTTERILL J

- [1] The appellant was convicted in the Klerksdorp regional court on a count of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 constituting statutory rape. The appellant was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997.
- [2] The appellant had an automatic right of appeal due to the imposition of a life sentence in the regional court.
- [3] It was not in dispute that the complainant, D M, was on 30 September 2007 at approximately 03:00 raped on her way home from the Blue House Tavern where she had been drinking.
- [4] The J88 was admitted wherein 2 tears and bruises to her hymen were reflected. To add insult to injury there was bruising and swelling around and above her right eye. She had to go to hospital for stitches for a deep 4 cm laceration to her right eyebrow. The DNA tests confirmed that the appellant's semen was found.

[5] The appellant denied that he raped the complainant. The appellant first proffered a defence of an alibi. After the DNA results were obtained, during the trial, the appellant ended the mandate of his first attorney and then obtained new legal representation and proffered a new defence of consensual intercourse.

[6] The court *a quo* was correct in accepting the evidence of the complainant as reliable and truthful despite being a single witness. Her evidence was corroborated by the DNA results and the injuries as reflected on the J88. She knew the appellant for many years and went to school with his sister. She was walking home from the tavern with two unknown men and when the appellant and another male offered to take her halfway home she accepted the offer because she at least knew the appellant. The exchange of chaperones took place in the street, 4 metres from a street light. She could see the appellant and had enough time to observe him. She could even recall the clothes that the appellant were wearing. She was dragged to an unlit scene where the appellant took out two condoms, gave one to his male companion and made use of the other. He undressed the complainant and himself and raped her. The other male did not rape her. She heard people approaching and she screamed whereupon the appellant and the other male ran away. She informed these two unknown males that had approached them that she had been raped. They called the police and the police arrived. She was thereafter taken to the doctor.

- [7] The complainant did not know the first report witness and the mere fact that this witness was not called did not render the complainant's version unreliable.
- [8] The fact that the complainant testified that the appellant wore a condom and yet DNA results were obtained also did not render her version improbable. The complainant herself testified that the condom could have torn.
- [9] The court *a quo* was correct in rejecting the version of the appellant as not being reasonably possibly true and in fact correctly found that his version was untrue. The appellant's alibi witness simply could not corroborate his version that he was at home with her and her daughter at 03:00 in the morning; this was so as she was asleep. The change of stance of the appellant after the results of the DNA were known is more than circumspect and the court *a quo* was correct in rejecting this as not being reasonably true. Once he knew the DNA was found he then changed his defence to one of having consensual sex with the complainant. The complainant having brought the charge because in the tavern he chased her away preventing her from telling his girlfriend that they had had consensual intercourse previously, was also correctly rejected.

[10] In *S v Chabalala* 2003 (1) SACR 134 (SCA) the court held as follows:

“The correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’ guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.”

In the words of the SCA in the context of the full picture the court *a quo* did not misdirect itself in accepting the version of the complainant and rejecting the version of the appellant.

[11] Ad sentence

The only appeal against sentence lies in the fact that the charge sheet referred to section 52 of the Criminal Law Amendment Act, Act 105 of 1997 (“the Act”). On the 25th of August 2008 the prosecution warned the appellant that the provisions of section 51(2) of the Act is applicable. Section 51(2) however prescribes the minimum sentence of 10 years of imprisonment for a first offender and 15 years of imprisonment for a second offender of rape. The court *a quo* thus erred in imposing a life sentence. Furthermore the state did not prove that the injuries sustained by the complainant amount to grievous bodily harm. Reliance was placed on *S v Makatu* 2014 (2) SACR 539 (SCA) wherein it was found that where there are deficiencies in the charge together with the fact that no mention had been made of the applicable section it leads to the inevitable conclusion that the sentence of life imprisonment was wrongly imposed.

- [12] Counsel for the state relied on *Ndlovu v The State* (204/2014) [2014] ZASCA 149 (26 September 2014) wherein the court found as follows:

“This court concluded that the fact that the charge-sheet had a defect which was never rectified, did not of its own render the proceedings invalid. Mbha AJA confirmed that the test is always whether or not the accused had suffered any prejudice. Furthermore, Mbha AJA noted that the appellant had

been sufficiently warned of the charge he faced by virtue of the reference to the minimum sentencing legislation in his charge sheet, and thus the required standard of 'sufficient detail' contained in s 35(3)(a) of the Constitution was met, despite the incorrect provision being referred to in the charge-sheet. In addition, the court found that the appellant was convicted on the evidence placed before the court and '[i]t has not been demonstrated that the appellant would have acted differently, had the mistake not been made in the charge sheet'.

This court dismissed the appeal against sentence and the sentence of life imprisonment was confirmed. In this matter, it was brought to the attention of the appellant at the outset of the trial that the state intended to rely on the minimum sentencing regime created by the Act, albeit that the incorrect section of the Act was referred to. As has already been mentioned, the appellant was advised that if convicted, he faced the possible imposition of a minimum sentence of 15 years' imprisonment. The facts of this matter are closely akin to those of Mashinini and Kolea. The principle emerging from Kolea is that the imposition of a sentence of life imprisonment in these circumstances will not in itself result in a failure of justice which vitiates the sentence."

[13] I am satisfied that the appellant had sufficient detail to inform the appellant that the Minimum Sentence Act was applicable and that he had been suitably warned. No facts have been set out as to how the appellant would have acted differently had the mistake not been in the charge sheet and how he had been prejudiced.

[14] The appellant argued that for the court to impose a life sentence the state must prove “grievous bodily harm” and the state did not do so. This is so because an expert did not testify that the 4 cm laceration did constitute grievous bodily harm. Furthermore the time period that lapsed between the assault and the rape is to such a degree that it cannot constitute rape which involved the infliction of grievous bodily harm.

[15] On the facts at hand the appellant had the intent to inflict grievous bodily harm. The appellant used a knife to inflict a 4 cm laceration above the eyebrow requiring stitches. The nature of the weapon and the nature of the injuries show such intent. The injuries need not be of a dangerous nature to constitute grievous bodily harm; *S v Mdua* 2001 (1) SACR 625 (T) at p627c-f. A further question must be answered; what was the reason and object, if any, for the action of the accused and what caused the accused to desist. The appellant desisted because the assault reduced the complainant helpless and he could rape her. The reason for the assault

was to overpower and render her helpless. The assault was not a separate act, but an act to facilitate the execution of the rape. The J88 was sufficient proof to set out the nature of the injuries. I am satisfied that the court *a quo* was entitled to impose life imprisonment.

[16] I accordingly propose the following order:

1. The appeal against conviction and sentence is dismissed.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

S.A. THOBANE

ACTING JUDGE OF THE HIGH COURT

CASE NO: A756/2014

HEARD ON: 6 March 2015

FOR THE APPELLANT: ADV. L.A. VAN WYK

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. A.P. WILSENACH

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 10 March 2015