

REPUBLIC OF SOUTH AFRICA



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

24/3/15
CASE NO: AB43/10

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
24/03/2015 <i>EIM/bush</i>	

In the matter between:

MOTHIBEDI PAUL DIRE

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

HEARD ON: 09 MARCH 2015

JUDGMENT ON: 24 MARCH 2015

KUBUSHI, J

1. On 23 October 2008, the appellant pleaded not guilty in the regional court, Klerksdorp on one count of rape. He was, however, found guilty and a sentence of 12 years imprisonment was imposed. The appellant applied for condonation for the late filing of his notice of appeal and the application was refused. The appellant then petitioned the high court for leave to appeal on both conviction and sentence but leave to appeal was granted in respect of sentence only. At the hearing of the appeal on sentence the matter was postponed *sine die* to give him an opportunity to apply for leave to appeal in respect of the refusal of leave to appeal on conviction. Eventually leave to appeal was granted in respect of conviction as well as sentence by the Supreme Court of Appeal. The appellant is thus before us on appeal against both conviction and sentence.
2. The appellant was legally represented throughout the trial.
3. The complainant's testimony is that on the night in question she had been to a certain tavern, Sun City tavern, in town. Later, between 22h00 and 23h00, when she was on her way home in Jouberton location a friend of hers, Skattie, whose boyfriend had a motor vehicle, offered to take her along. This was a private motor vehicle but the owner normally uses it as a taxi late at night when the taxis are no longer available. She paid a fare of R15 for the trip. In the motor vehicle she found the appellant who was unknown to her at that time. Along the way she informed the driver to drop her in extension 12. She stays in extension 12 together with her boyfriend. When they reached the location, the driver informed her that he would not be able to take her to extension 12 as it was far. She then asked to be dropped in Bosman where her parents stay. This was too far for the driver as well. It was at this stage that the appellant offered to escort her to Bosman. Skattie assured her that she would be safe with the appellant. The two, that is, the complainant and the appellant alighted at Five Stop. She walked with the appellant towards the direction of Score Supermarket. Unbeknown to her, this was the street where the appellant's house was. When they came to a certain house the appellant indicated that it was his house and that he was to fetch something which he can use to defend himself. The appellant invited the complainant to come in with him but she declined and opted to wait for him outside. It was at that point when her cell

phone rang – it was her boyfriend asking about her whereabouts. Whilst she was talking to the boyfriend, trying to explain where she was, the appellant grabbed the phone and put it in his pocket. He then manhandled the complainant by throttling her and pulled her into a shack that was on the premises where he raped her. She screamed and the appellant struck her twice with a fist on the face. The appellant also closed her mouth with a blanket to muffle the screams.

4. After the ordeal she dressed and left the shack. As she was walking out of the shack she noticed a woman from a neighbouring house looking at them. The woman rushed into her house when she realised the appellant might see her. The complainant became aware that the appellant was following her. When they exited the gate she saw a motor vehicle coming down the road. She rushed into the road to stop the motor vehicle. The motor vehicle stopped and she told the driver that the appellant raped her. There were two people in the motor vehicle. She did not know the driver but recognised the passenger, Buti, who she knew by sight. When the motor vehicle was about to leave the appellant gave her back the cell phone. She was taken to the police station where she laid a charge of rape against the appellant. It turned out that the driver of the motor vehicle was a police officer. She was also taken to hospital where she was examined.
5. During the rape, the complainant lost some personal belongings, namely, a watch, earrings, necklace and a pony tail hair piece. She went with the police back to the appellant's shack to look for them but did not find them. The appellant was later arrested.
6. The appellant admitted having sexual intercourse with the complainant but said it was with her consent. His testimony is that he was in the company of a friend at the same tavern where the complainant was on the night in question. When his friend left, Skattie, a lady he knew from the location, invited him to join the table where she was sitting with her boyfriend and the complainant. The complainant went to the bathroom and left her handbag with him. Later the complainant invited him to dance with her. As they were dancing the complainant was

embracing him with both hands. After they finished dancing, the complainant asked him to buy her liquor, which he did. While they were sitting there and consuming the liquor, the complainant embraced and kissed him and told him that she loved him. When he wanted to leave because it was late and he was afraid that he might miss the transport going to the location, Skattie offered him a lift in her boyfriend's motor vehicle. He, as a result, left the shebeen in the company of the complainant, Skattie and the boyfriend to Skattie. In the car the complainant indicated to Skattie that she was going with the appellant. The driver of the motor vehicle dropped him and the complainant at the gate of his premises. The complainant never asked to be taken to extension 12. He denied that there was any fare paid for the trip or that the complainant asked to be dropped in extension 12.

7. When they reached the appellant's place, the appellant asked the complainant to wait at the gate while he checked whether his parents were still awake. Upon his return they both went into his shack where they had sexual intercourse. After they left the shack the complainant's cell phone rang. It was her husband enquiring about her whereabouts. The appellant accompanied the complainant. As they left the premises a motor vehicle stopped next to them. There were two men in the motor vehicle. The passenger alighted from the motor vehicle, came rushing towards them, referring to the complainant as a 'bitch' and hit her with a fist. The driver alighted and pointed a firearm at the appellant. The complainant left with the two men. He was arrested later on his way to the police station to report a charge of being pointed with a firearm.

8. The trial court called inspector Johannes Manamela (Manamela), the police officer who picked up the complainant along the road and took her to the police station, as a court witness. Manamela corroborated the version of the complainant regarding her evidence relating to flagging down the motor vehicle he was driving that night. Manamela confirmed that the complainant reported the rape to him. Buti was also in his company at the time. When the complainant approached she seemed to be in shock and confused. She threw herself in the motor vehicle before they could even say she should come in.

AD CONVICTION

9. The submission by the appellant is that the state did not prove its case beyond reasonable doubt and that the version of the appellant is reasonably possibly true.
10. The appellant's submission is based on the fact that the evidence of the complainant being a single witness was not corroborated in that the state failed to present the evidence of Skattie and her boyfriend; the complainant's boyfriend; the doctor who examined her after she was raped; the woman neighbour who the complainant testified she saw as she was leaving the appellant's shack and/or Buti, who was a passenger in the motor vehicle that took the complainant to the police station and who the complainant said she knew.
11. The issue to be determined is whether the state has proved its case against the appellant beyond reasonable doubt and whether the trial court ought to have found the version of the appellant to be reasonably possibly true.
12. It is not a rule of law or practice that requires a court to find corroboration implicating an accused person, but what is required is for a court to warn itself of the peculiar danger of convicting on the evidence of a single witness and seek some safeguard reducing the risk of the wrong person being convicted, and such safeguard need not necessarily be corroboration.
13. In this instance, the complainant was a single witness insofar as the commission of the offence is concerned. It is trite that a court may convict on the evidence of a single witness as is provided in s 208 of the Criminal Procedure Act 51 of 1977.

14. The trial court was not obliged to seek corroboration of the complainant's evidence. It only had to look for a safeguard which would reduce the risk of wrongful conviction. It sought and found such safeguard in the evidence of the complainant. When analysing the evidence of the complainant, the trial court was aware that the complainant was a single witness and approached her evidence with the caution required in law. It satisfied itself, correctly so in my view, that the complainant was a credible and reliable witness and accepted her version as truthful. This is so because the evidence of the complainant was straight forward and clear. There were no discrepancies or contradictions. As stated by the trial court in its judgment, she withstood an extensive cross examination and did not falter an inch.
15. It is established law that a court of appeal rarely interferes with the credibility findings of a trial court. The powers of a court of appeal to interfere with the credibility findings of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including the acceptance of a witness' evidence, is presumed to be correct on the basis that the trial court had the advantage of seeing, hearing and appraising a witness.¹ There being no misdirection by the trial court in this instance, the credibility findings must stand.
16. The nature of corroboration required for the purpose of the cautionary rule, should be corroboration implicating the appellant in the commission of the offence and not merely corroboration in a material respect or respects.²
17. The contention by the appellant's counsel that the state should have called the persons stated in paragraph 10 of this judgment to corroborate the evidence of the complainant is unfounded. Except for Buti and the doctor, it would have been pointless for the state to call the other persons as witnesses because their evidence would not have corroborated the complainant's evidence in implicating the appellant in the commission of the offence.

¹ See S v Francis 1991 (1) SACR 198 (A).

² See Mulovhedzi v The State (257/13) [2013] ZASCA 201 (2 December 2013) para 13

18. Of the persons mentioned in paragraph 10 of this judgment, the doctor and Buti are the only ones who saw the complainant after she was allegedly raped by the appellant. A negative inference against the state for failing to tender the evidence of Buti, as called for by the appellant's counsel is unwarranted. Buti was in the company of Manamela at the time they met the appellant and the complainant and in all probabilities what he would testify would be the same as what Manamela testified. There was no need for the state to call a witness whose evidence would have been the same as that of another witness. Even though the medical report might have corroborated the complainant's evidence, the fact that such evidence was not tendered is not fatal to the state's case.
19. By corroboration it is meant other evidence which supports the evidence of the complainant and renders the evidence of the accused less probable on the issues in dispute.³
20. The trial court found such support in the evidence of Manamela. Manamela was an independent witness in as far as the commission of the offence was concerned. The evidence of Manamela corroborated that of the complainant in that it implicated the appellant in the commission of the offence. Manamela saw the complainant immediately after the commission of the offence. The complainant stopped him by getting into the road and immediately after he stopped, the complainant reported that the appellant, who was with her at the time, raped her. The complainant told him also that the appellant took her cell phone and indeed the appellant produced the cell phone and handed it to him.
21. He testified that the complainant 'appeared a shocked person' and confused showing that she was looking for assistance. Manamela took the complainant to the police station where she reported the rape.

³ See S v Gentle 2005 (1) SACR 420 (A) at para [18].

22. The contention by the appellant that Manamela did not relate the story himself but was led by the trial court is misconceived. It is evident from the record that the trial court only laid a basis for Manamela to understand why he was in court. Manamela related most of the story himself. For instance, most importantly, the trial court did not remind him how the complainant stopped him, that is, by running into the road or remind him about the cell phone which the complainant had testified that the appellant took from her and that he handed it over to Manamela.
23. As is trite the *onus* to prove the guilt of the appellant is on the state. The state must prove its case against the appellant beyond reasonable doubt. There is no *onus* of the appellant to prove his innocence. In order to be acquitted his version need only be reasonably possibly true.
24. The trial court having accepted the version of the complainant as truthful, it had to reject that of the appellant. The complainant's version was further fortified by the evidence of Manamela which rendered the version of the appellant less probable.
25. The evidence of the complainant corroborated by that of Manamela who I have already stated was an independent witness, makes the appellant's version that he had sexual intercourse with the complainant by consent, less probable. The manner in which the complainant ran into the road to stop Manamela's motor vehicle, that is, she threw herself into the path of travel of Manamela's motor vehicle with scant regard for her safety; and also throwing herself into the motor vehicle before it could be said that she should go in is indicative of a person who was in flight and in trouble. Her evidence is that the appellant was following her. This, the appellant also confirms. The first thing she says to Manamela is that she has been raped and indeed she proceeds to the police station where she lays a charge of rape against the appellant. Manamela's unchallenged evidence is that the complainant appeared to be in shock and was confused. Manamela is a police officer and had no reason to implicate the appellant in the commission of this offence. The appellant's counsel also conceded when a question was put to her

from the bench that nothing can be taken away from Manamela's evidence. The fact that Manamela did not arrest the appellant when the complainant reported the rape to him should not be held against the complainant.

26. The suggestion by the appellant's counsel that the two were found in an uncompromising position by Manamela and Buti does not convince me otherwise.

27. On the reasons stated above the appeal must fail.

AD SENTENCE

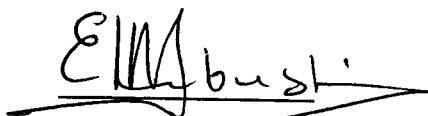
28. The charge against the appellant was read with s 51 (2) of the Criminal Law Amendment Act No. 105 of 1997 (the Act). The said section provides for the imposition of a minimum sentence of ten (10) year's imprisonment in respect of a first offender unless there are substantial and compelling circumstances warranting deviation from such a sentence.

29. In this instance, the trial court considered the traditional factors which a court should consider when imposing sentence, like for example, the personal circumstances of the appellant, the seriousness of the offence and the interest of society. It also took into account the aim of punishment being prevention, rehabilitation, retribution as well as deterrence. In aggravation of sentence it considered that the appellant deceived the complainant by undertaking to escort her to her parental home while knowing that he intended to rape her. The trial court also took into account the fact that the appellant hit the complainant twice with a fist. It came to a conclusion that there are no substantial and compelling circumstances warranting deviation from the prescribed sentence, and sentenced the appellant to twelve (12) years imprisonment.

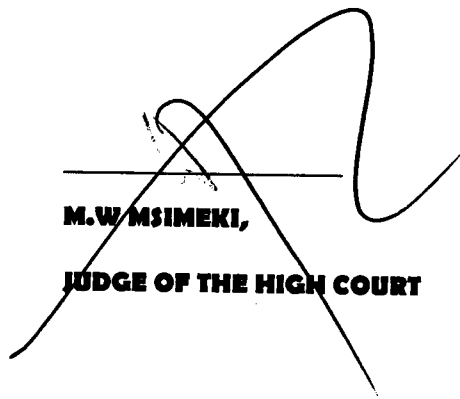
30. The appellant was a first offender and in terms of s 51 (2) of the Act, the trial court ought to have sentenced him to an effective period of ten (10) years imprisonment. The trial court does not state any reasons in its judgment why it found it necessary to impose a sentence of twelve (12) years imprisonment instead of ten (10) years imprisonment which is the prescribed minimum sentence. Having perused the record I could find no reason why such a sentence was imposed. The respondent's counsel is also of the view that without providing any reasons why such a sentence was imposed, the trial court erred in imposing that sentence.
31. Whilst sentencing is the prerogative of the trial court, in this instance, however, the trial court did not exercise its discretion properly and the sentence should be revisited by this court.
32. The submission by the appellant is that the facts of this case do not take this case out of the ordinary. According to the appellant, the trial court failed to apprise the defence that it was contemplating imposing a higher sentence than the minimum sentence. The trial court also failed to consider proportionality and to compare this case with other similar cases in order to avoid a disparity of sentences. The trial court seemingly was of the view that the fact that the appellant hit the complainant with a fist justified the imposition of an additional two (2) years of imprisonment. There is no evidence of serious injuries inflicted on the complainant and no medical evidence of any serious injuries was handed in, so the argument goes.
33. The appellant's contention is that in the circumstances of this case, we should find that the imposition of the sentence by the trial court would lead to an injustice and as such deviation from the prescribed minimum sentence as is required. Counsel for the appellant, as he argued, suggests a sentence of eight (8) years imprisonment to be fair and just in the circumstances of this case.

34. Although the respondent in its heads of argument argued for the dismissal of the appeal on sentence on the basis that the sentence imposed by the trial court is commensurate with the gravity of the offence and does not in any way evoke a feeling of shock, however, before us, the respondent's counsel concedes that the sentence imposed is inappropriate and should be tempered with. Counsel proposes that a sentence of nine (9) years imprisonment be imposed.
35. I am, therefore, of the view that the appeal on sentence should succeed and an appropriate sentence of eight (8) years imprisonment would be fair and just in the circumstances of this case.
36. In the premises I would propose to make the following order:
- a. The appeal on conviction is dismissed.
 - b. The conviction of the trial court is confirmed.
 - c. The appeal on sentence succeeds and the sentence of the trial court is set aside and substituted by the following:

"The accused is sentenced to eight (8) years imprisonment and in terms of section 103 of the Firearms Act No. 60 of 2000 the accused is declared unfit to possess a firearm."
 - d. The sentence is in terms of section 282 of the Criminal Procedure Act No. 51 of 1977, ante-dated to 23 February 2009, that is, the day on which the sentence was imposed.


E. M. KUBUSHI,
JUDGE OF THE HIGH COURT

I concur and it is so ordered


M. W. MSIMEKI,
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:

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