

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: A508 / 14

DATE: 24 APRIL 2015

REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

GOODWIN DICK

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MAVUNDLA J,

[1] The appellant an adult male 24 years of age at the time, now 28 years of age, together with his co-accused 1 and 3, was convicted by the Regional Court in Klersdorp on count 1, **rape** (section 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act 32 of 2007) read with read with s51 Criminal Law Amendment Act, 105 OF 1997, and count 2 **robbery** with aggravating circumstances and was sentenced respectively to life and 5 (five) years imprisonment.

[2] The appellant approached this court with the leave of the trial court on appeal, against both conviction and sentence. The grounds of appeal are essentially premised on two legs, firstly, that the trial court erred in finding that the State acquitted itself in discharging the *onus* resting on it, to prove beyond reasonable doubt the identity of the appellant as one of the complainant's assailants; secondly, the trial court misdirected itself in finding that the reason why the appellant's DNA was excluded as the donor of sperms was because complainant testified that the appellant used a condom at the time of the commission of the rape. The trial

court erred in finding that the State had proven the guilt of the appellant beyond reasonable doubt.

[3] The appellant was duly represented through the trial. He pleaded not guilty to both counts and did not disclose his defence but exercised his right of silence. Needless to state that, he was forewarned of the applicability of minimum sentences in respect of both counts.

[4] The State's case was premised on the evidence of the complainant Ms. S[...] A[...] V[...], Mr. Gilbert Mothibedi; constable Tebogo Justin Kwate; and exhibit "C" which is the s212 of the CPA affidavit of Captain Matukudu Samuel Mashegoane who is attached to the Biology Unit of the Forensic Science Laboratory as a Senior Forensic Analyst and a Reporting Officer holding a B.Sc. degree specializing in Microbiology and Biochemistry and who conducted the DNA analyses of the sperms uplifted with a swab from the womanhood of the complainant and concluded that the DNA test results show that the semen of accused 1 and 3 were recovered from the private parts of the complainant, and that the appellant was excluded as a donor of the semen found on the complainant. The Exhibit "C" was handed in by consent.

[5] The facts of this case, tersely put, are that on the 11 April 2010 at about 20:45 the complainant was returning from her friend's place where she spent the evening relaxing and drinking. According to her, although she consumed five "dumplings" of Sarita, she was not drunk. She was walking alone, on her way home, when she was accosted in a passage by three men who wrapped a towel around her head and robbed her at knife point of her money in an amount of R260, Nokia cell phone, Adidas canvas shoes, earring and a wig. She sustained cut injuries on her palm and fingers. The three men blindfolded her with the towel and carried her to a shack which is used as a church. The three men all took turns in raping her repeatedly, each one twice. She first had a glimpse to see that the men were three when they tried to tie her with the towel. A distance away there was an Apollo light which illuminated the area up to the church which was about 300 meters away. The men removed the towel from her when they entered the church. The door to the church was open towards the Apollo light. Its rays lit inside the church through the open door. She was undressed and the three men took turn in raping her. They had their trousers pulled down to their knees and kneeled as they raped her. The appellant had dreadlocks and Chinese eyes. Accused 1 had a cap and was dark in complexion. Accused 3 had a camouflage top and was the first to rape her and did not use a condom. He was followed by the appellant who did not wear a condom. After the appellant had sexual intercourse with her, accused 1 then raped her without using a condom. Thereafter accused 3 again raped her followed by accused 1 and last by the appellant. After finishing raping her, accused 3 took her black and white, with white stripes Adidas shoes, earrings and a wig, and the three left. She walked out of the church and walked towards her place, as she was crying. Along the way she met Gilbert to whom she reported her ordeal. He walked her halfway to her place and left. She later saw Mr. Gilbert Mothibedi coming with police. She further testified that she was stabbed with a knife on her hand, sustained injury on her mouth.

The complainant was injured on her mouth, hand and on her foot and was walking with a limp.

[6] Under cross examination she said, inter alia, that the only source of light was the Apollo light. When she was covered with the towel she could not see anything. However she unexpectedly pulled the towel up and turned and the men moved around and came in front of her and she then managed to see them. The appellant searched her and took her Nokia cell phone. When she tried to scream accused 3 hit her with a fist while accused 1 was holding a towel. She tried to scream and they tied her with a towel. Accused 1 had white cap, white shorts and a Dark T-shirt. The appellant was wearing a two piece of Dickey. Accused 3 had dark brown camouflage. The door was open. There was a reflection of light going through the open door. She did not give to the police the description of the clothes the men were wearing, save that they had a towel and took her tekkies.

[7] The evidence of Mr. Gilbert Mothibedi was that on the date in question he was residing at T Extension 6 in Khuma location. At about 11 in the evening he was at Cansas place watching TV with friends. He went outside to remove laundry from the line when he heard someone screaming. He went outside in the direction from where the scream came. In the street he met the complainant who informed him that she had just been raped by three people. The complainant appeared frightened and was shaking. He noticed that she the complainant was limping. She gave a description of her assailants. Along the way they met a police vehicle and they (presumably he was with his friends) took them to where the complainant was.

[8] Under cross examination he said that the complainant explained to him that the incident happened at the church premises. There are flood lights referred to as Apollo in that vicinity, illuminating with a yellow light which was not very bright. The Apollo light does not bring any form of light in the church vicinity. Illumination in the vicinity of the church is from the lights from the houses around the area. Although the complainant smelt of liquor, she appeared sober to him. She informed him that she was robbed of a towel, cell phone and cash. She did not give any description of what her assailants were wearing. He cannot recall what the complainant was wearing. He recalls that she told him that her assailants pressed a knife on her.

[9] Constable Kwate who was patrolling with his colleague, went to look for the complainant. On finding her along the way, she reported to him that she was raped by three men who took her items already mentioned herein above, as well as the fact that the men had also a towel. Kwate left the complainant at the police station where she was eventually taken to Dr. Rawat who examined her and completed his medical report which was handed in and accepted as J88. Kwate went to a tavern which is not far away from the police station, where he saw three men sitting outside. On seeing him, one of the three men went inside the tavern. Kwate found the two men in possession of a towel and the complainant's shoes, cell phone and, earrings. He arrested these two who were accused 1 and accused 3 and locked them up in his police vehicle. He then entered the tavern and inquired about the man he had just seen entering. He was directed to an outside toilet

next to which he found the appellant in a squatting position and hiding. He arrested the appellant and took him together with accused 1 and 3 to the police station, where on seeing them entering, the complainant pointed the arrested trio as the men who had raped her. It is common cause that there was no formal identification parade held.

[10] The defence of the appellant was that on the day on the 10 April 2010 he went to Jabulani tavern to play juke box. He proceeded to one of the rooms where there is a snooker table and found two men playing snooker. At that moment he became pressed and went outside to a place demarcated for urinating, where he relieved himself. While he was urinating, he heard a sound of a gun being cocked behind him by a police officer who asked him what he was doing. He responded by asking whether the officer could not see what he was doing. The officer pulled him up, he (the appellant) then fell against a corrugated iron sheet. Another police officer came to the scene. The appellant was "roughed" up and kicked. The police officers handcuffed him and took him to the police van where he found the other two coaccused who were unknown to him.

Under cross examination he said that at the police station he was shown an elderly lady after he was assaulted. He did not see the complainant at the police station but saw her for the first time in court. He said that he did not see his co-accused at the tavern. He denied that the police officer who arrested him found him kneeling. He said that he would not comment to the officer's evidence that on his entry at the tavern the appellant moved from where he was seated and entered inside the tavern. He conceded that the officer arrested him at the back of the tavern. The appellant did not call any witness and closed his case after his testimony.

[11] The trial court accepted the evidence of the State and rejected that of the defence and convicted the appellant as charged.

[12] It is *trite* that the State bears the *onus* to prove the guilt of an accused beyond reasonable doubt. The accused bears no *onus* to prove his innocence. It suffices if he gives an explanation, even if the court does not believe him, if it is reasonable possible true, then he is entitled to an acquittal; *vide S v Charzen and Another* 2006 (2) SACR 143 (SCA), *S v Mafiri* 2003 (2) SACR 121 (SCA) at 125c-d. In the matter of *S v Van DerMeyden* 1999 (2) SA 79 (WLD) at 80H-81C it was held that:

"The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable

possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. The court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In *R v Hlongwane* 1959 (3) SA 337 (A), after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H--341B, which applies equally to any other defence which might present itself:

'But it is important to bear in mind that in applying this test, the *alibi* does not have to be considered in isolation____The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

[13] In *S v Shackell* 2001 (2) SACR 185 (5CA) at 194g-i. the Supreme Court of Appeal cautioned against the rejection of an accused person's version solely on the ground that his version is improbable and stated that:

"It is trite that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that the mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. It cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[14] The issue to be determined *in casu*, is whether the State has acquitted itself of the *onus* resting on it to prove the guilt of the appellant beyond reasonable doubt. The trial court in assessing the evidence before it must look holistically at the evidence of the State and that of the accused, without compartmentalizing it; lest a distorted conclusion is arrived at.

[15] It is trite that the evidence of a complainant in sexual related cases, of a single witness, of identification witness, as well as of an accomplice, must be approached with a measure of caution. The court may convict on the strength of the evidence of a single witness, who is satisfactory in all material respect or is corroborated by something else outside the evidence; vide *R v Mokoena* 1956 (3) SA 81 (A) at 85—6; *S v Lesedi* 1963 (2) SA 471 (A) at 473F; *S v Sauls and Others* 1981 (3) SA 172 at 180E-G.

[16] A complainant in a sexual complaint case, with whatever shortcomings on her part, her evidence can be

corroborated by the scientific *DNA* analysis report. *In casu*, it is common cause that the appellant was excluded as the donor of sperms collected on the womanhood of the complainant by Dr. Rawat. The learned magistrate attributed this exclusion to, as he put it: "And I still maintain the complainant informed us at the time when accused 2 was raping her he used a condom. That is why the DNA could not detect his sperms." The learned magistrate further stated that: "Court: Accused 2 did not have a condom that is what she said."

[17] It is prudent to first deal with the issue of the *DNA*. The trial court in its judgment said the following:

"The evidence before me is overwhelming that all the accused were involved in this rape. And I still maintain the complainant informed us at the time when accused 2 was raping her he used a condom. That is why the *DNA* could not detect his sperms."¹ The magistrate proceeded to convict the appellant and his co-accused.

[18] It is appropriate to chronicle in detail the following recorded evidence, which is in my view, crucial:

"PROSECUTOR: Alright. You say accused 2 had dreadlock at the time—Yes

Yes—The other one had a pet (sic) on, a cap that is accused 1. Could you see his face with that cap? — He was dark in, in complexion.

Do you remember anything about accused 3?—Accused 3 had a camouflage top that is worn by people from the Army.

Yes what, what happened now? What happened after they pulled down their pants down their knees? What happened then? -.....The accused had sexual intercourse (intervene)

COURT: Simultaneously— One after another taking turns.

Ja now you show us who started, — Accused 3 started.

PROSECUTOR: Did he use a condom? —No.

Yes and then?—Then accused 2 came.

Did he use a condom? —No. Accused 2 did not wear a condom. Then came accused 1.

Did he use a condom? — No.

COURT: Mmm.

PROSECUTOR: Yes after— Accused 3 came again he repeated the sexual intercourse.

Yes—Accused 1 came again repeated the sexual activity.

Yes— The last person to repeat was Accused 2.

Yes 𐄂hen they finished the shoes that I was having on they took the Adidas shoes."²

[19] The record further reveals that there was some confusion on the part of the magistrate around this issue of the use or lack thereof by the appellant and a dispute with counsel for the appellant on this issue. The following is recorded during the address stage:

"COURT: Accused 2 did not have a condom that is what she said."³

MR. MYBURG: He did not have a condom yes Your Worship, but that is exactly my point Your Worship. If they had a condom then of course Your Worship there would have been no *DNA* because the *DNA* would have been in the Condom....⁴

COURT: Accused 2 the second with a condom do you see it?

MR. MYBURG: But at least on the first occasion (intervene).

Court: Said accused 2 is the second to rape her with a condom (intervene)

MR. MYBURG: No Your Worship that is not what my notes say.

COURT: That is what is here.

MR. MYBURG: Your Worship all the, all the notes of the defence attorneys says no condom Your Worship. My notes especially say that, because it was a very important point for the defence of accused 2.

COURT: I wrote it here accused 2 is the second to rape her with a condom, accused 3 repeated and accused 1 and also accused 2⁵. (It would seem that the magistrate here was relying on his notes)."

[20] It is trite that the Court of appeal does not rely on the submissions made in the Court *a quo*, but rather on the recorded evidence. Where there is some missing evidence, it is permissible for the trial court to reconstruct the missing evidence from his notes. However, such reconstruction must be ratified by the accused through an affidavit confirming that, to his best recollection the reconstruction is correct. Of course where the accused is legally represented, the reconstruction must also be presented to his legal representative

as well, for his comments. *Vide S v Zenzile* 2009 (2) SACR 407 (WCC) at paragraph [7].

[21] *In casu* we are not dealing with missing evidence. We are dealing with a situation where, on record, it is clear that the insistence on the part of the magistrate that the complainant said the appellant used a condom, is demonstrably wrong. The magistrate initially said that according to the complainant the appellant did not use a condom, but shortly thereafter contradicting this accession. It is only in exceptional circumstances, such as *in casu*, that the Court of appeal would look at the submissions made at the court *a quo*, to seek clarity. But of course the Court of appeal cannot ignore the recorded evidence.

[22] The complainant said that the appellant did not use a condom. In my view, from the recorded evidence, it is demonstrably clear that the magistrate misdirected himself in his conclusion that the reason why the appellant was excluded by the *DNA* is because he had used a condom. In the matter of *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645E-F it was held that:

"...in the absence of demonstrable and material misdirection by the trial Court, its finding of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong" *Vide also R v Dhlumayo and another* 1948 (2) SA 677 (A).

[23] There is also another possibility why the *DNA* excluded the appellant, which might be that the complainant wrongly identified the appellant as one of her assailants. Constable Kwate took the complainant to the police station, and shortly thereafter he arrested the appellant. There is no evidence that the complainant had made mention to him that one of her assailants had dreadlocks. Neither did Mr Mothibedi make mention of having been informed by the complainant that one of her assailants had dreadlocks. Constable Kwate brought the appellant at the police station without ensuring that he was not seen by the complainant, and later arrange a proper identification parade. The complainant might have concluded that because the three suspects, including the appellant, have been arrested by Kwate therefore all of them were her assailants. The circumstances under which the appellant was identified, does not, in my view, pass muster to hold that the identification was satisfactory and sufficient enough to warrant the acceptance of the complainant's evidence of identification as reliable; *vide S v Sithoie and Others* 1999 (1) SA 585 at 591e-f.

[24] The evidence of the complainant as a single witness, as well as a complainant in a sexual related offence, and an identifying witness, must be approached with caution. Her evidence must be corroborated by something more, outside the ordinary, for it to be safely accepted as reliable. The *DNA* is empirical reliable evidence which would have corroborated the complainant, and placed beyond any shadow of doubt the involvement of the appellant in the commission of the rape case. I am therefore inclined to follow the matter of *S v Masango* 2014 JDR 0990 (GNP) and conclude that that the complainant was a single witness and the *DNA* that excluded the appellant as a donor of the semen casted enough doubt on the correctness of the

conviction on the rape count.

[25] The fact that the appellant is excluded in the rape case through the DNA result, taken together with the conclusion reached by this court on identification, coupled with the fact that there is no evidence that any of the complainant's robbed items were found with the appellant, his conviction on the robbery count can therefore not stand. In the result I conclude that the appeal against conviction and sentence on both count 1 and count 2 must be upheld and the conviction and sentences should be set aside.

[26] In the result, the following order is made:

(i) That the appeal against conviction and sentence on the rape count and robbery count is upheld.

(ii) That the conviction and sentence on both the rape count and robbery counts are hereby set aside.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I AGREE

H.J. DEVOS

JUDGE OF THE HIGH COURT

DATE OF HEARING : 18 NOVEMBER 2014

DATE OF JUDGMENT: 24 APRIL 2015 APPICANT'S ATT : PRETORIA JUSTICE CENTRE.

APPLICANT'S ADV : MR. L. AUGUSTYN

RESPONDENTS' ATT : DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA

RESONDENT'S ATT : ADV M.J. MAKGWATHA

1 Paginated pages 338 lines 23-339 line2.

2 Paginated page 61 lines 1- page 62 lines 1-7.

3 Paginated page 304 lines 11-12.

4 Paginated page 304 lines 13-17.

5 Paginated page 306 lines8- 307 lines 1-25.