

**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Appeal number: A207/2014

In the Appeal of:

**PATRIC SELLO LUCAS**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

RAMPAI, AJP *et* MURRAY, AJ

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**JUDGMENT BY:**

RAMPAI, AJP

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**HEARD ON:**

8 DECEMBER 2014

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**DELIVERED ON:**

5 February 2015

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- [1] These were appeal proceedings. The appellant was found guilty of rape. He was then sentenced to 15 years imprisonment. He was aggrieved by both the conviction and the sentence. He came to us with the leave of the trial court. The respondent opposed the appeal on both fronts.

- [2] An incident took place at Theunissen one day during March 2013. A teenage girl N[...] E[...] R[...] was attacked in the street and taken to a shack where she was sexually violated or molested.
- [3] The incident gave rise to a charge of rape. The appellant was arrested on 25 April 2014 in connection with the incident. The prosecution alleged that the appellant raped N[...] E[...] R..., a girl 16 years of age, at Theunissen on 20 March 2013 in contravention of section 13 of Sexual Offence and Related Matters Act, Act No. 32/2007, read with section 92 (2) of the Criminal Procedure Act, Act No. 51 of 1977 and section 51(1) of the Criminal Law Amendment Act, Act No. 105 of 1997 as well as Part I, Schedule 2 thereof.
- [4] The appellant was tried in the Welkom Regional Court. His trial commenced on 10 March 2014. He pleaded not guilty. He was legally represented. On 19 March 2014 he was convicted. On the same day he was sentenced to 15 years imprisonment. He was aggrieved. On 15 August 2014 he was granted leave to appeal.
- [5] The version of the state was narrated by two witnesses, namely: Ms N[...] E[...] R..., the complainant and Ms N[...] R..., her cousin. The version of the complainant was that she and her cousin were walking on foot in the evening. They were on their way home. She stayed with her maternal grandmother. The two girls were from Tshepong Mine in Welkom where they had visited her father. The appellant surprised them at ±20:00. Because she refused to go with him, he brandished a panga, hurled abusive

insults at her, pounced on her, restrained her and took her to his shack. Her cousin ran away from the scene when the appellant tightly held her. His shack was  $\pm 100$  metre from the scene of the confrontation.

- [6] There he undressed her and raped her. Initially he penetrated vaginally but later anally as well. When she screamed he once again hurled vulgar language at her and threatened to chop her with a panga. She started bleeding from her vagina in the process. When he was done, he walked with her but turned back at a certain shop.
- [7] She walked home and slept. She told nobody about the incident at home, at school or at Virginia Hospital. She was afraid to tell. She first reported the rape incident to Sr Tlatsi of Lusaka Clinic. The nurse called the police. She later made a statement to the police. Her grandmother accompanied her to the police for that purpose. She became so ill that she was taken to Virginia Hospital by an ambulance a day after the incident. It would appear that the police took her to Bongani Hospital on 26 April 2013 where Sr M T Ceba, a forensic nurse completed Form J88 medical report. The incident took place on 13 March 2013 and not on 20 March 2013. Her cousin corroborated her to a certain extent.
- [8] The version of the defence was narrated by the appellant alone. He denied that he was involved in the incident on 13 March 2013. He admitted, however, that he was at Theunissen on that day. He denied raping the complainant on 20 March 2013. He

asserted that he was not at Theunissen on 20 March 2013 but at Winburg where, on that day, he was looking for a job.

- [9] The trial magistrate found that the complainant properly identified the appellant as her rapist or as the perpetrator. On behalf of the appellant the finding was supported. It was contended by Ms Liebenberg that there was sufficiently reliable evidence concerning the identification of the appellant contrary to the contention of the appellant.
- [10] The issue in the case revolved around the identity of the perpetrator. The reliability and not the credibility of the prosecutor's witnesses was questioned and criticised.
- [11] As regards conviction, the ground of the appeal was that the complainant could not have made correct observation of the perpetrator because her identification of the perpetrator was adversely impaired by the prevailing darkness.
- [12] The identificative evidence of a witness is approached by the courts with caution. Such caution is exercised by vigilant testing of the reliability features of the identifying witness' observation - **S v Mthetwa** 1972 (3) SA 766 (A) at 768A-C. The trial court was mindful and alive to the principle. In my view the trial court cautiously treated the complainant's evidence of identification. The trial court correctly found that the evidence of the cousin did not make any significant contribution as far as the issue of the perpetrator's identify was concerned.

[13] The complainant's evidence of identification contained the following favourable features which enhanced the reliability of her observations:

- she had prior knowledge of the appellant;
- she knew him by his nickname, Enzo;
- she knew he had a gold plated tooth;
- she knew precisely where he stayed;
- she recognised him when he approached her and her cousin on the scene in the street;
- the initial scene of the confrontation was not completely dark because some lights from a shop in the vicinity slightly or dimly illuminated the scene;
- she walked with him for a distance of 100 metre from there to the shack;
- there was a burning electric lamp inside the appellant's shack;
- the appellant stopped raping her as result of the blood he saw oozing from her vagina because the shack was well lit;
- she spent some appreciable length of time with him in his well-lit shack;
- she again walked with him for some time from his shack to the point near the shop where the lights were burning;
- his face was unmasked and his head hairless.

[14] There were certain unfavourable features of the complainant's evidence of identification. The encounter took place at night – 20:00. The street was not brightly illustrated. The complainant did not report the incident at the first available opportunity. The

trial magistrate properly dealt with this aspect and the various factors which caused the delay.

[15] She was afraid that members of her family would scold her; that her aunt would angrily confront the appellant; that she was afraid the appellant would have her killed and that she was uncertain as to how to go about reporting such a degrading sexual incident. Her behaviour might have appeared strange at a first glance. However, I hasten to point out that her cousin, who sensed danger and ran home, reported to no member of the family that the complainant was in trouble and needed to be rescued. However she reported to no adult in the house. Later on the complainant behaved in a similar manner. The similar conduct of the two girls told a story. I gained the impression that the complainant was a motherless girl living in a totally dysfunctional household where no family support system of any sort existed. The trial magistrate pointed out that no adverse inference may be drawn from the complainant's delay or omission to make such a previous and consistent statement – section 58 and section 59 of the Sexual Offence and Related Act, Act no. 32 of 2007.

[16] It was indeed so that the complainant could no longer remember how the appellant was dressed. Her lack of recollection was not a crucial aspect. The fact of the matter was that she had prior knowledge of the appellant. Similarly, nothing significant turned on her evidence that she knew the appellant by sight. Her evidence to that effect was clearly an understatement. The undisputed evidence showed that the appellant was not a

stranger to her. She knew him a whole lot more than just by mere sight.

- [17] The prosecutor failed to canvass the complainants' evidence concerning the actual date of the incident. During cross-examination the complainant was adamant that the correct date was 13 March 2013 and not 20 March 2013. The appellant was not thereby prejudiced. His alibi was opportunistic. Moreover, it concerned an irrelevant date. As regards the crucial and relevant date, 13 March 2013, the evidence of the appellant was hopelessly boiled down to a bare denial. He gave no explanation whatsoever of his movements at Theunissen that day. Some snippets of his alibi surfaced after the complainant had pointed out that the date mentioned in the charge sheet was incorrect. He opportunistically tried to take advantage of the loophole or the discrepancy in the prosecution case. **Rex v Hepworth** 1928 AD 265 on 277.
- [18] When the favourable features and the unfavourable features of the complainant's evidence of identity are compared, it becomes clear and obvious that she had ample opportunity to make reliable observations notwithstanding some unfavourable features, and some contradictions by her cousin. Her identificative evidence was substantially reliable, in my view.
- [19] The trial magistrate was also aware that the complainant was a child witness; that she was also a single witness and that the court had to treat her evidence with caution. In my view the trial court cautiously considered the complainant's evidence and

correctly found that it was satisfactory in all material respects – **R v Mokoena** 1932 OPD 79.

- [20] When the evidence as a whole was considered, it became apparent that the evidence tendered by the state against the appellant was so strong that the appellant's version could not be reasonably true. The trial court was correct in rejecting it as beyond reasonable doubt false.
- [21] In my view the trial magistrate committed no material misdirection. I would, therefore, dismiss the appeal as regards conviction. However, the verdict that the appellant was guilty as charged was incorrect. The appellant was charged in terms of section 51(1)(a) of Act No. 105 of 1977 read with Part I of Schedule 2 – rape(a)(i) category. The mere fact that the appellant sexually penetrated the complainant vaginally as well as anally did not justify the conclusion that he raped her more than once. There was, on the appellant's mind, a single intent at the same place and time. See **S v Blaauw** 1999 (2) SACR 295 (W) at 300a-b per Borchers J. The trial court materially erred in this regard and the appellant should therefore be convicted of rape in terms of Section 51(2)(b)(i) of Act No. 105 of 1977 read with Part III of Schedule 2. That carries with it a prescribed minimum sentence of 10 years for a first offender.
- [22] As regards sentence, the principle is that a court with appellate jurisdiction can interfere with the sentence imposed by the trial court if it is convinced that the trial court committed a material

misdirection or that the sentence is shockingly inappropriate – **S v Pieters** 1987 (3) SA 717 (A).

- [23] The trial magistrate found that the appellant committed an offence as envisaged in terms of section 51(1)(a), Act No 105 of 1977 read with Part I, Schedule 2 in that he raped the complainant more than once – see rape category (a)(i). The prescribed minimum sentence for such an offence is life imprisonment. Although the evidence showed that the appellant vaginally and anally penetrated the complainant his two forms of penetrations through different bodily apertures, constituted one and not two sexual acts of rape. The two acts of rape were, in my view, erroneously dichotomised in the verdict. The two were inextricably linked not only in terms of place and time but also by way of a single and dominant criminal intent.
- [24] On account of such material misdirection and huge penal disparity between the prescribed minimum sentence in terms of section 51(1) and section 51(2) appellate interference is also justified as regards sentence. In the case of the former the prescribed minimum sentence is life imprisonment – (vide Part I) whereas in the case of the latter the prescribed minimum sentence is imprisonment for a period of 10 years - (vide Part III). We are, therefore, at large to consider the question of sentence afresh.
- [25] In sentencing the appellant to 15 years instead of life imprisonment the trial magistrate took into account the following personal circumstances of the appellant as mitigating factors:

- he was 24 years of age at the time he was sentenced but 23 years of age when he committed the crime;
- he was not married but had two dependent minor children;
- he did casual jobs and earned R1 400 per month on average;
- he maintained his children and his terminally ill mother;
- he stopped raping the victim when he realised she was bleeding;

**S v SMM** 2013 (2) SACR 292 (SCA);

- he was incarcerated for 11 months from 25 April 2013;  
**S v Stephen & Another** 1994 (2) SACR 163 (W) at 168e-g;  
**S v Raboko** 2010 (1) SACR 310 (O) at 318j;
- he was a first offender.

[26] In sentencing the appellant the trial court also took into account the following circumstances as aggravating factors;

- the gravity of the crime of rape;
- the appellant aggressively pounced upon the complainant, abused her, threatened her with a panga, and genitally injured her;
- the complainant profusely bled for a long time;
- she became very ill as a result of the rape;
- she suffered severe emotional trauma and depression;
- she was a virgin and a teenager.

[27] In my view there were no substantially compelling circumstances to warrant a reduction of the prescribed minimum sentence of 10 years' imprisonment. The aggravating factors so overshadowed

the mitigating factors that the imposition of the prescribed minimum sentence would, in my view, be too lenient and disproportionate to the gravity of the crime and the interest of the community. I am, therefore, not persuaded that there is much room to exercise appellate interference as regards the actual 15 year sentence imposed.

[28] Notwithstanding some favourable aspects of the appellant's profile as an individual, the fact that he audaciously acted like a predator and penetrated a child in a reprehensible manner is a strongly aggravating factor. The repercussions of his sexual violation of the child have caused her to endure a great deal of pain. She agonises about the adverse impact thereof on her future health. When men take sexual advantage of vulnerable children, they must expect that they will be retributively punished.

[29] Accordingly, I make the following order:

29.1 The appeal fails *in toto*;

29.2 The conviction of the appellant on a charge of rape (a)(i) as envisaged in Part I of Schedule 2 is set aside. It is substituted with a conviction on a charge of rape as envisaged in Part III of Schedule 2 to Act No. 105 of 1977.

29.3 The sentence of imprisonment for 15 years is confirmed.

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**M. H. RAMPAL, AJP**

I concur.

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**H. MURRAY, AJ**

On behalf of the appellant: Adv. P. van der Merwe  
Instructed by:  
Bloemfontein Justice Centre  
Bloemfontein

On behalf of the respondent: Adv. E. Liebenberg  
Instructed by:  
The Director: Public Prosecutions  
Bloemfontein

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