

THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. A89/2013

In the matter between:

THABANG MOLEHE

1st Appellant

SECHABA KOOS LINKS

2nd Appellant

and

THE STATE_

Respondent

CORAM:

RAMPAL, J et NAIDOO, J

JUDGMENT BY:

NAIDOO, J

HEARD ON:

9 FEBRUARY 2015

DELIVERED ON:

14 MAY 2015

NAIDOO J

- [1] The appellants and two others (accused 2 and 4) were charged with rape in the Regional Court, Bloemfontein. The appellants were accused 3 and 1 respectively in the trial court. They were convicted as charged and each was sentenced to Twenty Five (25) years' imprisonment . After

their application for leave to appeal against conviction and sentence was dismissed by the trial court, the appellants petitioned the Judge President and were granted leave to appeal against sentence only. They then petitioned the Supreme Court of Appeal and were granted leave to appeal against their conviction. They are therefore before us on appeal against both conviction and sentence. Mr M Khang appeared for the appellants and Ms A Ferreira appeared for the State.

- [2] The judgment of the court *a quo* is assailed, in respect of the conviction of both appellants, on a number of grounds, which included the assertion that the complainant's evidence was inconsistent with and contradictory to that of all the other state witnesses, namely the doctor who examined the complainant after the incident, her "first report", being her cousin, her companion at the time of the incident and the investigating officer. The contradictions and inconsistencies in the evidence of the investigating officer were also listed as a ground of appeal. The defence further raised the failure of the state to lead DNA evidence, after the doctor found a condom in the vagina of the complaint, and asserted that the court erred by not giving proper consideration thereto as a weakness in the state's case. The court's "re-opening" the state's case by recalling the investigating officer and thereafter not allowing the defence to re-open its case in rebuttal was cited as a further ground of appeal. It was contended that the sentence of twenty five (25) years' imprisonment is inappropriate and induces a sense of shock, and should be set aside. The State, conversely, agrees with the conviction and sentence in respect of both appellants.

- [3] The state's case rested on five witnesses. The complainant testified that she and three of her friends (a female and two males) were at a tavern called Malume's Place during the evening of 4 April 2008. As she and her friends were leaving the tavern in the early hours of 5 April 2008, she was confronted by the second appellant, who was in the company of the first appellant and accused 2, and who wanted to speak to her. One of her male companions enquired why the second appellant wanted to speak to her, which resulted in a fight, which saw the two male companions fleeing the scene. The complainant and her female companion remained until the latter was also chased away by the second appellant, leaving the complainant alone. The second appellant then took hold of her and marched her at knife point to a shack nearby. His two companions were also in their company. At the shack, the door was opened by accused 4. A candle was lit and the second appellant then ordered the complainant to undress, while still in possession of the knife he earlier threatened her with. At some stage he slapped her and asked her to lie on a mattress on the floor and proceeded to rape her. When he was done, he remained in the room and threatened her with the knife when she tried to resist the advances of the first appellant, who also raped her. Accused 4 was next and when he was done, accused 2 entered the room and he too had sexual intercourse with her, against her will. The second appellant, together with the first appellant and accused 2 then left the shack, leaving the complainant behind with accused 4. She thereafter also left the shack.

- [4] She then went to her cousin E. M. and reported what had happened to her and they proceeded to the police station to lay a charge.

The complainant was then taken to hospital to be examined by a doctor. Her further evidence was that she was present when the second appellant and accused 4 were arrested. She pointed the latter out to the investigating officer. She was not present when the first appellant and accused 2 were arrested, nor did she point out accused 2 or his house to the investigating officer.

- [5] The complainant's relative, E. M. was clearly reluctant to come to court and the trial court correctly pointed out that he was not impressed that the complainant woke him up early in the morning. He corroborated her version that she told him she had been raped by four boys and he confirmed that she was crying. He however denied accompanying the complainant to the police station to open a charge. Dr Marais, who examined the complainant indicated that she had injuries to the genital area which indicated non-cooperative penetration. She also found a condom in the complainant's vagina, which was sent with the crime kit, normally collected from rape victims, for the purpose of DNA testing.

- [6] The investigating Officer, Inspector Nthabi, testified that when he received the docket on 7 April, the second appellant had already been arrested and was in custody. The complainant pointed out a house to him where she alleged she was raped by four men. His initial testimony was that this was the house

of accused 2 and they found him at this house. He was later recalled by the court and then testified that in fact accused 2 was not at home and he left a note for him to call at the police station. The complainant was not present when accused 2 reported to the police station the next day and was placed under arrest. Nthabi's further evidence was that accused 2 led him to the home of the first appellant, who then pointed out accused 4. He also indicated, when he was recalled that he received the docket on 5 April 2008 and not 7 April 2008, as he had initially testified.

- [7] The appellants did not deny that the complainant was raped as she had indicated and also took no issue with the evidence of Dr Marais. They deny being involved in the commission of the offence and placed identity in issue. The appellants, who live in the same house, proffered an alibi defence, alleging that they were at home with other members of the first appellant's family. Apart from going in the afternoon to buy vegetables from a market, which is run from someone's garage and the second appellant visiting a colleague's home to collect some money, they went nowhere else. The other two accused, namely accused 2 and 4 also put forward alibi defences, alleging that they were in their respective homes at the time that the complainant alleges that they raped her.
- [8] The appellants did not dispute that the incident began to unfold at the tavern called Malume's Place. The complainant's evidence as well as that of one of her companions, M. M. (M.), was that it was fairly dark at the gate where the argument between her

companions and the other group of men took place and that only the light from the tavern reflected in that area. It was also not disputed that beyond that point it was dark and visibility was poor and that the shack to which the complainant was taken was unlit. It is common cause that no identity parade was held after the arrest of (especially) the first appellant and accused 2 and 4.

- [9] There were indeed a number of aspects on which the evidence of the complainant differed with that of the other state witnesses. One of the most significant of these, according to the defence, concerns the arrest of the first appellant and accused 2 and 4. The complainant was adamant that she pointed out the second appellant (accused 1) and accused 4 and that she was not present when accused 2 and the first appellant (accused 3) were arrested. She also indicated that she pointed out to Inspector Nthabi, the house of accused 4 as the scene where the rape took place. Nthabi testified that it was the house of accused 2 that the complainant had in fact pointed out to him.
- [10] The complainant told Dr Marais that one of the four men had penetrated her anally as well. Although Dr Marais could find no injury to the anus, she did not exclude the possibility of anal penetration. The complainant did not mention this in her evidence and in response to a question by the court, said that she was not penetrated anally. She indicated that her cousin E. M. accompanied her to the police station, whereas his evidence is that he did not. Her companion, M. M., who was called as a state witness, was unable to give any description of the physical appearance of the four men that

accosted him and the rest of his group, and could not confirm the description of the headgear or the clothing, that the complainant said were worn by the first and third appellants. He in fact said that it appeared as if the person, who was referred to as Mohra and who grabbed the complainant, had his hair braided.

[11] The evidence of the complainant differed with that of Nthabi in a few respects. As indicated, the complainant's evidence was that she told Nthabi that she was raped at the house of accused 4, which led him to request her to call him if she notices the door open. Her further evidence is that Nthabi informed her that accused 4 was found at that house and he brought accused 4 to the home where she was staying, on the day that he was arrested. Nthabi asked if this was one of the people who raped her and she answered in the affirmative. Nthabi's evidence, on the other hand, is that the house pointed out to him by the complainant as the place where she was raped turned out to be the house of accused 2. His evidence regarding the arrest of accused 2 and 4, as set out in paragraph [6] differs from the account of the complainant. Nthabi also said, after being recalled, that he took the police photographer to photograph the house, and as nobody was present, only the outside of the house was photographed. The prosecutor submitted to the court a quo that the state did not succeed in proving, beyond reasonable doubt, its case against the first appellant and his co-accused. I will return to this aspect later.

[12] The complainant is a single witness regarding a large part of the events at the tavern as well as the rape in this matter.

There is no doubt that she was raped and suffered a great deal of emotional trauma. When the complainant's obvious trauma and her state of intoxication (albeit moderate) are added to this, the possibility of mistaken identity must be a factor to consider and her evidence must be carefully assessed in the light of all the other evidence in order to determine reliability of such evidence. The differences between her evidence and that of the other state witnesses must also be critically examined to determine how material such contradictions are and what weight should be attached to them. As a starting point it must be borne in mind that the appellants have, in essence, admitted the events leading up to the rape and the rape itself, and only place identity in issue, alleging that they were not present at the tavern or the shack where the rape took place and that they did not perpetrate the offence.

- [13] The court, in its assessment of the evidence in this matter, must look at the evidence in its totality to determine if the guilt of the accused has been proven beyond reasonable doubt. Examining individual or component parts of the evidence can also be a useful exercise but such evidence must ultimately be considered as part of the whole body of evidence. The analogy used in **S v Shilakwe 2012(1) SACR 16 (SCA)** is that of a mosaic. The components of evidence are the pieces of the mosaic, but the mosaic must be considered as a whole in order to arrive at a proper conclusion regarding the guilt of the accused. A dictum expressing a similar view is to be found in **S v Chabalala 2003(1) SACR 134 SCA**, where Heher AJA (as he then was) said at paragraph [15] of that judgment:

“The correct approach 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’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party...was decisive but that can only be an *ex post facto* determination and a trial court (and counsel should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence”

- [14] I proceed now to examine the evidence which contributes to the evidential “mosaic” in this matter. The complainant admitted that she and her friends had been consuming liquor prior to the confrontation between her companions and the group of men outside the tavern, and that she had been moderately drunk. Her further evidence is that the appellants and accused 2 had also been drinking at the tavern prior to this incident. It is common cause that the second appellant is known by the name Mohra, that he and the complainant had lived in the same area while they were growing up and that they knew each other since their school days. The complainant’s evidence is that she encountered the second appellant, in the company of two males whom she later identified as the first appellant and accused 2, as she arrived at the tavern earlier in the evening, and after they greeted each other, the second appellant said to her that he would like to see her when she is leaving the tavern. There was no mistake about his identity at that stage as he was in an area that was lit. She also observed him and his two companions inside the tavern which was also well lit. When he approached her and her companions at the time they were

leaving the tavern, the complainant appears to have had a conversation with him, addressing him by the name of Mohra, which her friend, M.M. (one of the state witnesses), heard. It is not in dispute that this is how he came to know the name "Mohra". M.'s further evidence was that it appeared to him, from the way the complainant spoke to Mohra, that they knew each other, as she appeared comfortable with him. I am satisfied that as far as the second appellant is concerned, the trial court correctly held that the complainant was able to properly identify him. In addition, she was present when the second appellant was arrested and saw the knife he threatened her with when it was recovered by the police while they were searching the second appellant.

- [15] The complainant's evidence was that she observed accused 2 and the first appellant in the company of the second appellant while they were inside the tavern. When she and her companions were leaving the tavern, they encountered the second appellant and two (or perhaps even three) others in an area which was illuminated by the light from the tavern. When the confrontation between the two groups ensued, she was able to observe the appellants and their co-accused, and although the scene was clearly volatile and moving rapidly, as she and her companions were running away, the complainant was able to identify the first appellant and his co-accused as being part of the group that attacked her friends. Thereafter, when the second appellant grabbed hold of her, she appears to have been walking in an area which was not lit or very poorly, until they reached the shack where she was raped. The complainant's evidence is that accused 2 and the first appellant, in fact left the tavern with the

second appellant and she was quite sure that the first appellant and accused 2 were the people walking behind her and the second appellant on the way to the shack. The shack to which she was taken was also not lit, and a candle was thereafter lit to provide illumination. It was never specifically canvassed with her that the light of the candle was insufficient for her to clearly see her assailants. Again, she was sure that the first appellant was amongst those in the shack. She was able to see them in the light of the candle.

[16] I turn to the discrepancies in the evidence of the state witnesses, which were highlighted by the defence, and which Mr Khang submits render the complainant's evidence unreliable. With regard to the arrest of the first appellant and his co-accused, the complainant appeared to be somewhat confused about which accused she actually pointed out. It must be borne in mind that this was after the traumatic experience she endured at the hands of four men who violated her so brutally. What is clear is that she pointed out a shack to Nthabi as the place where she was raped. Nthabi would have had no way of knowing who the occupants of this shack were and only subsequently learned that accused 2 lived there. It can be accepted that the complainant did not point out accused 2. It is true that Nthabi can be criticised for making the mistake he initially made regarding the arrest of accused 2. It is relevant that accused 2's shack was closer to the tavern than that of accused 4. The complainant's evidence was that she did not walk far before they got to the shack where she was raped. The evidence of the police photographer and the photographs he took, confirm that it was in fact accused 2's shack that was pointed out to Nthabi.

It should also be borne in mind that accused 2 is not before this court but what unfolded after his arrest is very relevant.

- [17] Accused 2 was quick to distance himself from what happened at his shack. Nthabi's evidence is that accused 2 conceded that the second appellant arrived at his shack with a girl, asking for a place to sleep. There were others there but they did not participate in any sexual activity concerning this girl. He then led Nthabi to the home of the first appellant. As indicated earlier, the first and second appellant live in the same house and are related to each other. It also transpired from the evidence of the second appellant that he and accused 2 play soccer together. In my view there was a strong link between the two appellants and accused 2 and any suggestion that they have been randomly picked on as the perpetrators cannot be sustained. According to Nthabi, it was the first appellant that led him to accused 4, whose evidence was that he and the first appellant were good friends and spent much time with each other, including the afternoon of the 4 April 2008, which was a few hours before the complainant says she encountered the appellants at the tavern. The evidence of the complainant was that she observed accused 4 opening the door of the shack where she was raped. Again, in my view, his becoming an accused in this matter was not random or a mistake, and is intrinsically linked to the relationship he shared with the first appellant. Nthabi can, once again, be criticised for not holding an identity parade, given his evidence that the complainant was not present when the first appellant was arrested. Nthabi and the prosecutor were silent as to why this was not done, but it seems the defence, in the court *a quo*

did not pursue the failure to hold an identity parade with much vigour. If the appellants were not the perpetrators of the offence and were randomly arrested, the question is how would Nthabi have known who to arrest? The complainant's evidence regarding the arrest of some of the accused is at variance with Nthabi's evidence in this regard. If she did not point out the first appellant, then Nthabi's evidence regarding how he ended up at the first appellant's home is the only logical answer. It is true that the first appellant was not arrested at the same time as the second appellant. He testified that he was present when the second appellant was arrested and if he had been one of the perpetrators, the complainant, who was also present when the second appellant was arrested, would have pointed him out. It was never put to the complainant that the first appellant was in fact present when the second appellant was arrested. The complainant also could not have known that they lived in the same house; if he was present, she would in all probability have pointed him out. The failure of the complainant to point out the first appellant on the day the second appellant was arrested may well have been one of the reasons for the prosecutor's concession that the case against, inter alia, the first appellant was not proven beyond reasonable doubt. In my view the concession was wrongly made, considering what has been said above.

- [17] A further matter that seems shrouded in mystery is the issue of the DNA evidence. The prosecutor failed to present the forensic results or explain the failure to do so. Her only comment appears to be that the DNA test results would have given some indication of which of the accused persons was

involved in the commission of the offence. The court *a quo* did not mention this aspect at all in its judgment. Mr Khang in his address to this court indicated that the condom found in the body of the complainant was sent for forensic testing. This is the only indication that it was in fact sent for testing. It is expected of a prosecutor to disclose to the court what such results were, as that may have been of significance in either including or excluding one or more of the accused persons as perpetrators. Similarly, if such results were not available or could not be obtained, it is also expected of the prosecutor to have at least explained the reasons therefor. The prosecutor's silence was most unhelpful. It is also regrettable that the magistrate did not at least touch upon this in her judgment. However, her reasoning regarding the rest of the evidence, leading to the conviction of the appellants was correct, even without the DNA evidence.

- [18] As mentioned above, the court *a quo* was criticised for having “re-opened” the State’s case by calling the police photographer and recalling Nthabi, as well as for lengthy “clarification” of issues, which the defence contended had amounted to cross examination. Where the court requires clarification it is entitled to ask questions in order to obtain such clarity. It is well established in our law that a criminal trial is not a game or the presiding officer a referee. He or she is a trier of fact with the objective of finding the truth. In this regard, I refer to the well known dictum of Curlewis J in **R v Hepworth 1928 AD 265 at 277**, which finds application:

“A criminal trial is not a game...and a Judge’s position...is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings

according to recognised rules of procedure but to see that justice is done”

Sections 167 and 186 of the Criminal Procedure Act 51 of 1977 (the Act) provide for the nature of judicial questioning in court and for the court to subpoena witnesses respectively.

Section 167 provides that:

“The Court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at such proceedings, and the Court shall examine or recall and re-examine, the person concerned if his evidence appears to the Court essential to the just decision of the case.”

Section 186 provides that:

“The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.”

- [17] In the present matter, the defence has not pointed to specific parts of the record to sustain their contention that the magistrate was not within her bounds to question the witnesses as she did. On my perusal of the record, it appears that the court did question witnesses, some of them at length. However, the nature of the questions did not to my mind, amount to improper questioning, cross examination or an attempt to bolster the state case. The prosecutor’s ineffectual leading of the state witness and lacuna in the cross examination of such witnesses by the appellants’ legal representatives prompted the magistrate to extract evidence that was necessary for her to make a proper finding in this matter. Similarly, the calling of the police photographer,

Warrant Officer De Witt, was to ensure that the shack referred to by Nthabi was in fact that of accused 2. The recalling of Nthabi appears to be to clarify the date he received the docket and how it came about that accused 2 was arrested, that is to say clarity about the version of accused 2 which was not specifically put to Nthabi when he initially testified. The interventions of the magistrate in this regard do not, to my mind render the trial unfair. In fact Nthabi confirmed the version of accused 2 regarding his arrest. The defence complains that they were not allowed to reopen their case after the court's intervention. It is not clear what evidence they sought to lead in rebuttal, as nothing was put before this court in order to assess the validity of that submission.

- [18] With regard to the differences in the complainant's evidence, compared to that of her companion, M., I have indicated that it was dark, the scene was volatile and quite mobile, and M. did not see these persons prior to that moment when they confronted him. It is to be expected that he would not have had the opportunity to observe his attackers and remember details of their manner of dress in the same way as the complainant who had been observing them throughout the evening, prior to the confrontation. With regard to what she said to the doctor who examined her, my view is that such discrepancies as there were, do not bear on the fairness of the trial, or the issue of the identity of the appellants and more importantly on the reliability of the other aspects of the complainant's evidence. It was a matter relevant to credibility only. There could be any number of reasons why the complainant told the doctor that she was also anally

penetrated, for example, she was still very emotionally traumatised and was not in the frame of mind to think rationally, or that she did not understand the doctor's question. It may well be that the doctor misunderstood the complainant, as it appears that the doctor spoke in English to the complainant, without the benefit of an interpreter. None of this was pursued by the prosecution or the defence. Consequently, I do not believe that a negative inference can now be drawn against the veracity of the complainant as a result of this discrepancy.

- [19] With regard to sentence, the defence correctly concedes that the minimum sentence of life imprisonment applies in this matter. The trial court took into all the relevant circumstances of the appellants and concluded that there are substantial and compelling circumstances justifying the departure from the prescribed minimum sentence. The imposition of a sentence of twenty five years' imprisonment was as a result of the exercise of the judicial discretion allowed to the trial court, after careful consideration of all relevant factors. An appeal court can interfere in the sentence only if the trial court misdirected itself in the application of the law or the facts in arriving at the relevant sentence or if it exercised its discretion injudiciously. I can find neither in this case.

- [20] In the circumstances, the following order is made:

The appeal against the conviction and sentence is dismissed.

S. NAIDOO, J

I agree

M. H. RAMPAL, J

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