

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

Appeal No.: A96/2015

In the appeal between:

LEKULA JOSEPH MAFIRIKA

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* MURRAY, AJ

JUDGEMENT: RAMPAL, J

HEARD ON: 24 AUGUST 2015

DELIVERED ON: 3 SEPTEMBER 2015

[1] These were appeal proceedings. The appellant was tried in the Welkom Regional Court where he was convicted on two charges. Following his conviction he was sentenced to an effective custodial term of 12 years imprisonment. He was aggrieved by both. He came to us on appeal with the leave of the court *a quo*.

[2] An incident took place at [...] Section [...] on Saturday, 18 January 2014. Two men broke into that house in the early hours of the morning. They found the complainant sleeping in her bedroom. They attacked her, threatened to harm her,

overpowered her, raped her and robbed her of her belongings. They then vanished from the scene.

- [3] The appellant was subsequently arrested in connection with the incident. Two charges were levelled against him. The first charge was that he unlawfully and intentionally committed an act of sexual penetration with the complainant, Ms N. A. M., 53 years of age by penetrating her vagina with his penis without her consent.
- [4] The second charge preferred against the appellant was one of housebreaking with intent to rob and robbery with aggravating circumstances. The state alleged that he robbed the aforesaid complainant of her DVD player, worth R200,00, amplifier worth R300 and a Samsung cellphone worth R399,00. The total value of her loss, was therefore, R899,00. Both of those offences were committed at the same place and time as mentioned in paragraph 2 above.
- [5] The trial commenced on 8 December 2014. Mr Sesele presided, Mr Radebe prosecuted and Mr Van Wyk defended. The appellant pleaded not guilty to both charges. He did not disclose the basis of his plea.
- [6] Notwithstanding his plea the appellant was found guilty as charged on 19 March 2015. The next day, on 20 March 2015, he was sentenced to 8 years imprisonment in respect of the first charge and 12 years imprisonment in respect of the second charge. The regional magistrate directed in terms of

section 280(2) that the two sentences should run concurrently.

- [7] The appellant was aggrieved by the conviction as well as the sentence. He immediately applied for leave to appeal against both. Still on 20 March 2015 he was granted leave to appeal against the conviction and sentence.
- [8] As regards the conviction the ground of the appellant's appeal were set out in paragraph 2 of the notice of appeal which was filed on 25 March 2015. The thrust of all these was that the court *a quo* erred in finding that the appellant's version was beyond reasonable doubt false and that the victim, a single witness, who had made conflicting statements was an impressive witness.
- [9] The issue in this appeal revolved around the identity of the perpetrator(s) of the two offences.
- [10] Mr Makhene, counsel for the appellant, argued that there was a materially inconsistent discord between the victim's subsequent testimony and her previous witness statement. Counsel accordingly submitted that the court *a quo* erred in finding that the victim's evidence established, beyond reasonable doubt, the identity of the appellant as one of the perpetrators. Mr Makhene argued that since the victim knew the appellant and since she claimed that he was one of the two perpetrators, she should have named him in her witness statement. He stressed that the appellant's first name Lekula, was "an important fact which goes directly to the root of the

dispute on identity". In view of the victim's previous statement which was inconsistent with her testimony, the court *a quo* erred in holding that the victim's evidence was truthful given the circumstances of the material omission in her previous statement.

[11] Mr Strauss, counsel for the respondent, differed. He argued that the omission of the appellant's first name in the victim's police statement did not *per se* render her testimony untrue. He submitted that the mere omission did not justify the conclusion that her testimony and her statement were not reconcilable.

"Daar word groot gewag gemaak van haar getuieverklaring en getuienis in die hof dat dit nie versoenbaar is nie." So contended Mr Strauss.

Mr Strauss further submitted that the court *a quo* did not err in accepting the victim's testimony as credibly honest evidence.

[12] The version of the prosecution was narrated by the following witnesses:

- 12.1 Ms N A M. - the complainant;
- 12.2 Sr M T Ceba - the forensic nurse;
- 12.3 Ms A Ntodi – constable;
- 12.4 Mr M M Kareli - lieutenant;
- 12.5 Mr B Mahlaku - constable and investigating officer;
- 12.6 Ms L van Rooyen – warrant officer.

[13] The testimony of the victim was under serious attack on appeal.

“The criticism levelled against the complainant’s evidence is that in her statement which was taken on the 18/01/2014 she referred to two unknown persons who entered her bedroom. She did not mention any name nor any acquaintance with any one of those persons. In court however, and for the first time, she testified that one of them was the appellant whom she had known before the incident.

The submission is that the court, in the circumstances where there is a previous inconsistent statement, erred in holding that her evidence was truthful and reliable in all material respects when she omitted to mention such an important fact which goes directly to the root of the dispute on identity.”

So argued Mr Makhene.

[14] The appellant insinuated, through the foregoing line of argument, that the victim was not a credible witness. He contended that her failure to mention the name of the appellant in her police statement rendered her testimony highly suspect. The victim made a statement concerning the incident on 18 January 2014 less than six hours after the incident. The statement was attested by one Ms Mathapelo Ramokuane at Odendaalsrus at 09:00 – see exhibit “b”. Paragraph 3 thereof reads:

“At about 3:45 while I was sleeping in my bedroom I heard my bedroom open and when I woke up I saw two unknown African males entering my bedroom.”

[15] In her direct evidence she testified that two people X and Y entered her bedroom – the one was unmasked (X), the other was masked (Y). At the time she first saw the intruders she could not instantly figure out who they were because she had just woken up and she was in a state of shock. At that stage therefore, the intruders appeared to be unknown to her. But then X, the unmasked intruder, became aggressive. He charged at her. They wrestled near the window. At one stage during the course of the wrestling X was facing towards the window. With the aid of the light generated by a high mast community lamp she positively identified X as “Lekula”, her son’s friend.

[16] Much of the appellant’s criticism of the victim centred around the victim’s averment that “two unknown people” entered her bedroom. The appellant narrowly considered that phrase in isolation. However, once paragraph 3, exhibit “b” is broadly read in a proper context of the complainant’s testimony as a whole, what appeared, at first glance, to be a great inconsistency falls apart. In my view there was no inconsistency between the victim’s previous statement and her subsequent testimony which rendered her evidence incredible. This disposes of the appellant’s first bone of contention.

[17] The appellant’s second bone of contention was crafted as follows at paragraph 8 of the appellant’s heads of argument:

“The second bone of contention is why, when she knew the appellant by name and also knew where he was staying, did she

not take the police to his address that same morning? We submit that, this is what would have been expected of her if she was sure that the appellant is the person who raped her in her own house.”

So submitted Mr Makhene. I shall revert to the victim’s meeting with the police later. Let me first deal with her encounter with the intruders before the arrival of the police on the scene.

[18] The general insinuation was that the victim did not really know the appellant as well as she claimed she did. The contention was that if she did, she would have alerted the unmasked X before he raped her that she recognised him and that his name was Lekula. That was the first critique.

[19] The victim’s evidence was that she and the unmasked intruder wrestled. She yelled to alert her neighbours that she was in trouble but no-one came to her rescue. The unmasked intruder slapped her in the face. She continued to yell. He tried to gag her. She bit his finger. His masked companion drew out a knife, approached her brandishing a knife and commanded her to surrender. She feared for her life. Then X, angrily slapped her again. Her fear intensified. All her resistance was broken. She gave up.

[20] The following exchange between Mr Radebe, the prosecutor, and Ms M., the complainant, as recorded on page 13: 04-10 is important:

“Why did you not call him by his name to show him that you know him? --- I was afraid Your Worship of this knife.

But why did you say Lekula what are you doing, why were you afraid, telling him that you know him, Lekula what are you doing? --
- Your Worship I know him, I know him and I am scared of him, he was going to stab me, if even I could call his name he was going to stab me.”

[21] The aforesaid evidence concerned the complainant’s fear before she was raped. But it did not end there. Her fear continued throughout the entire rape episode and beyond. She explained her fear after the rape during the further exchange between her and the prosecutor as follows:

“PROSECUTOR: Yes? --- After that then the accused person requested a knife from his friend Your Worship, saying to his friend give me a knife.

Yes? --- I then asked him Your Worship crying by then Your Worship saying to him **Ntate do not kill me** for the sake of my children.

Yes? --- Then from there his friend did not want him to kill me, he said **this lady I want to kill her because she saw me**.

Yes” --- Then his friend Your Worship did not agree to handover the knife to the accused person. They then went to the kitchen.”

[22] Upon my integrated reading of the two passages quoted above, it became quite clear to me that the complainant did not call X, the unmasked intruder, by his real name, “Lekula”. She did not want him to realise that she recognised him and that she knew him by the name Lekula. She was fearful that he would kill her if he became aware that she identified him by his name. Her explanation makes perfect sense to me. She did not want to sign her own death warrant by calling X by his

real name. The trial magistrate appreciated the significance of the complainant's explanation.

[23] In my view her failure to make X aware that she knew him by name did not adversely affect her credibility in any manner whatsoever. This then disposes of the appellant's first critique of the complainant's omission.

[24] The appellant's second critique on the basis of which he also attacked the complainant's credibility, concerned her first report of the rape incident to Mrs M., her neighbour. Mr Van Wyk, the trial defense attorney, pointed out to the complainant that there was no mention of the name Lekula as one of the suspects in the neighbour's statement. It was put to the complainant that she reported to her neighbour soon after the incident that two unknown men raped her. She answered the question by saying: "I said I was raped by Lekula".

[25] The neighbour's statement was not exhibited in the court *quo* during trial. However, it can be accepted that the name Lekula appeared nowhere in her neighbour's statement. It can also be accepted that the disputed phrase "two unknown men" appears somewhere in her statement. If those facts were incorrect the prosecutor would have objected. He did not. It was an undisputed fact that the complainant reported to her neighbour that she was raped and that there were two men involved. The question before us was whether she specifically mentioned to her neighbour that one of the two men was Lekula as she testified or whether she reported that two unknown men raped her as her neighbour stated.

[26] The neighbour was not called to testify. The correctness of her statement was in no way tested. The complainant testified on oath. She denied the allegation attributed to her by the neighbour to the effect that she told her that she was raped by two unknown men. But she maintained that she was raped by Lekula although there were two men involved. Obviously she did not appreciate that the masked intruder also raped her by inserting his fingers in her vagina. The complainant's testimony and the neighbour's statement were indeed inconsistent in that respect. Since the neighbour did not testify the testimony of the complainant must prevail. In the circumstances, the inconsistency complained of in no way affected the complainant's credibility.

[27] The third front from which the appellants launched an attack on the complainant's credibility concerned her own statement. It was common cause that the name Lekula appeared nowhere in the complainant's witness statement – see exhibit "b". It was argued on behalf of the appellant, on appeal as well as at the trial below, that the omission was indicative of her false accusation that the appellant was involved in the incident. She answered the question by saying that: Lekula was truly involved; that she was not falsely accusing him; that she told the police so; that the police who interviewed her advised her not to mention the name of the suspect because, as they said, she could not have clearly seen him and because they claimed that she did not have any proof that Lekula was involved.

[28] She was pressed to concede that she did not, on the day of the incident, tell the police that Lekula was on the scene, but she did not. She was then asked whether she wanted the court to believe that she was so ill-advised by the police, she answered: "... they (the police) are the ones who write (sic) down the statements."

Implicit in that answer was an assertion that, given the opportunity to write down her statement on her own, she would not have omitted to mention the name of Lekula.

[29] Mr Makhene, submitted that the complainant's answers in connection with the omission of the name Lekula in her statement were not satisfactory at all. It was improbable, counsel contended, that the police would ill-advise a prime victim as the complainant alleged they did. Well, the complainant was steadfast that she was so advised by the police. The police who were on the scene, whoever they were, were not called by the appellant's legal representative to refute the victim's testimony. Moreover, the state called the investigating officer, Detective/Constable Mahlaku. The matter was not taken up with him by the defence. He might have shed some light on the matter. In the light of all these I am not persuaded that the complainant's evidence was untrue. I accept that she gave a credible account of what transpired between her and the police on 18 January 2014.

[30] It is well to remind ourselves about the following apposite comments:

“Polisieverklarings is dikwels onvolledig, soms selfs ten aansien van belangrike feite. Die omstandighede waaronder en die besondere persoon aan wie so 'n verklaring gemaak was, is dikwels vir die onvolledigheid van sulke verklarings verantwoordelik.”

S v Mlumbi and Another 1991 (1) SACR 235 (A) at 248(b) per M T Steyn JA.

See also **S v Mafalidso & Andere** 2003 (1) SACR 583 (SCA).

[31] In pretty much a similar vein the views of Horn AJ concerning the purpose of a witness statement were summarised as follows in the headnote of **S v Bruiners en Ander** 1998 (2) SACR 432 at 433c-d:

“Die doel van 'n getuieverklaring was om die besonderhede van 'n misdaad te bekom sodat daar besluit kon word of die beskuldigde vervolg moes word. Dit was nie die doel van so 'n verklaring om die getuie se getuienis in die hof vooruit te loop nie, en dit was vergesog om van 'n getuie te verwag om in so 'n verklaring presies dieselfde weergawe te verskaf as wat hy in die ope hof sou getuig.”

[32] The complainant was a single witness as regards the incident itself. The court *a quo* was alive to the salient principle that the evidence of a single witness must be treated with caution. The same principle applies to the evidence pertaining to the identity of an alleged perpetrator. Equally important is the principle that the exercise of caution should not be allowed to displace the exercise of common sense – **S v Sauls** 1981 (3) SA 172 (A) at 180E-H. On appeal Mr Makhene conceded that the court *a quo* was mindful of this principle and that it applied

the principle correctly to the facts of this case. Therefore, the appellant's reliance on this ground can be taken as abandoned.

[33] Now I revert to the complainant's conduct at the time she first met the police. There was no evidence as to the circumstances in which the appellant was arrested. The complainant's evidence was that she knew where the appellant lived. It was contended that her evidence was doubtful seeing that she did not, on 18 January 2015, immediately take the police to the appellant's place of residence. Her answer was that she did not because the police did not ask her to do so. In my view it could not be seriously argued that her explanation was unreasonable. She could not have been expected to dictate the pace of the investigation to the police. It was for the investigating officer to decide when to go out in search of the suspects known or unknown. There was no substance in the critique levelled against her. This contention also failed to impress me.

[34] The appellant was arrested in connection with the complainant's rape. Although we did not know the circumstances relative to his arrest we can reasonably deduce that he was arrested on the strength of the information the investigating officer obtained from the victim. The core of such information would certainly have included, among others, the appellant's name and place of residence. Common sense dictates that this should be accepted – **Sauls** *supra*. If I am correct in drawing such an inference, then the appellant's argument that the complainant mentioned his

name for the very first time in court when she testified was certainly incorrect.

[35] I am quite satisfied that the victim was a truthful witness. For instance she testified that before the wrestling or the physical attack started in her bedroom she did not recognise any of the intruders; that Y and not X was armed with a knife; that Y and not X actually robbed her of her belongings. She did not show any vindictive inclination to exaggerate the actions of X, the unmasked intruder. In my view she was an honest witness. Her testimony was not tarnished by any false blemishes. Her evidence as a whole was credible in all material respects. However, it does not end with her credibility, more is required in order to avoid the danger of an innocent mistake.

[36] In **S v Mthetwa** 1972 (3) SA 766 (A) at 768A Holmes JA said evidence of identity is approached by the courts with some caution on account of the fallibility of human faculties of observation.

Something more than the mere assertion by the witness that she has correctly identified the appellant as one of the culprits is generally required if the inherent risk or danger of error is to be guarded against. There must be no reasonable doubt that the complainant as the identifying witness is not mistaken – **S v Sithole & Others** 1999 (1) SACR 585 (W) at 591e-f.

[37] Now I turn to examine the evidence to determine whether the complainant's evidence was reliable or not. As regards the

unfavourable features of the victim's observation, the following:

The incident took place during night-time. She was ill. She was still fast asleep seconds before her bedroom door was opened by the intruders. There was no burning lamp in her bedroom at the time. She woke up and saw two men in her bedroom. She noticed that one was masked. She realised that she was in danger. She was shocked. She started yelling. She was attacked, tossed around, assaulted and threatened with a knife.

[38] As regards the favourable features of her observation the following:

The front window of her bedroom had thin and transparent curtain with a lace. Her premises were illuminated by two high mast lamps. The front of her house was illuminated by the lamp situated at K2 and the back by the lamp situated at K5, the section or neighbourhood where she lived. The light of K2 lamp permeated her bedroom through the front window. With the aid of such light it was possible for her to identify an acquaintance in her bedroom even if her bedroom lamp was off. She knew the appellant by sight and by name. He was her son's friend. The appellant knew her as M.'s mother. The appellant knew where she lived. He lived in the same neighbourhood. He was in that neighbourhood during the night between Friday 17 January 2014 and Saturday 18 January 2014.

[39] The victim put up some fight before her resistance was broken by physical assault and threat to stab her to death.

During the ensuing brawl between her and X, X faced the window. At that critical moment she recognised that X, the unmasked and aggressive intruder, was her son's friend, Lekula. During the brawl she bit Lekula's finger so hard that he bled. His blood-stained her nightdress and her pillow. Among others, she also told the forensic nurse about the injury she inflicted on her rapist. Moreover, she handed her blood-stained nightdress to the forensic nurse. See paragraph 5 exhibit "c", a medical report completed by Sr Ceba, the forensic nurse.

[40] In my view, the favourable aspects of the complainant's observation eclipsed the unfavourable aspects thereof by far. The evidence of the victim was not merely credible but was also, beyond reasonable doubt, reliable in all material respects. The trial magistrate noted, after the physical examination, that the appellant's right middle finger had a visible v-shape scar. The objective evidence of the appellant's impaired finger materially corroborated the victim's evidence that the appellant was indeed one of the intruders who raped her. Her reliable observation of the unmasked intruder led to her correct proper identification of the appellant as one of the culprits.

[41] By 08:00 on the very same day of the incident, the appellant was on his way out of Kutloanong where the victim was raped about 4 hours earlier. He went to Welkom. That was his evidence. His early departure from the neighbourhood tended to create the suspicion that he was distancing himself from the scene. The guilty are afraid – so goes the saying.

[42] The appellant was not a truthful witness. The complainant's evidence was that the appellant was her son's friend. Her averment was never challenged during cross-examination. Contrary to all expectations, the appellant testified but denied that the victim's son was his friend. He claimed that his brother and the victim's son were friends. His belated denial was false. He desperately tried to distance himself from the victim. His explanation of how he sustained injury to his right middle finger was bedevilled with vagueness. He was very reluctant to admit that the victim knew him by the name Lekula. The following exchange between him and his attorney demonstrated just how jittery and evasive he was:

- "She further testified that she knows you as Lekula --- **No**, I never known that.
- Are you known as Lekula sir? --- Yes, my name is Lekula.
- Now how does she know your name sir" --- **You mean my name?**
- Yes? --- She got it from her child."

He found it difficult to admit that the complainant knew him by name.

[43] During cross-examination the appellant admitted that the victim knew him by name; that he knew where she lived; that she lived in the neighbourhood called Section K5 and that he also lived in the same neighbourhood, something he had earlier denied. He claimed that the victim had the motive to falsely accuse him. Called upon to explain the alleged motive, he guessed that "maybe" she was influenced by

certain boys hostile to him to falsely incriminate him. The appellant tried very hard, in more ways than one, to distance himself from the victim whose evidence was that she had known him since the days of his childhood. He denied her evidence. The appellant was 29 years of age at the time he was apprehended. Therefore, she must have known him for many years – no less than 11 years, conservatively estimating. It would appear therefore, that her prior knowledge of the appellant greatly strengthened the contention that she correctly identified him in her bedroom.

[44] The aforesaid various aspects of criticism against the appellant prompted me to describe the appellant as an extremely unsatisfactory witness. The description flowed from the general impression he created about himself. His false defence of alibi coupled with various untrue aspects of his testimony bolstered the contention that the victim, who knew the appellant by sight and by name, could not have made a mistake as to the identity of the unmasked man who broke into her house on the day in question. I am satisfied that the victim made proper observation of the man and reliably identified him notwithstanding certain unfavourable features of her observation already alluded to. I am persuaded that there was no mistaken or false incrimination in this instance.

[45] In the circumstances, I am not persuaded that the court *a quo* committed any material misdirection which rendered the judgment appealable. In the absence of such misdirection no appellate interference is warranted. The conclusion reached by the regional magistrate is one which I, on appeal, cannot

hold to be wrong. I would, therefore, confirm the conviction of the appellant on the strength of the credible and reliable evidence of the complainant.

[46] As regards sentence, I shall be brief. In sentencing the appellant the following personal circumstances of the appellant had to be taken into account:

- He was 30 years of age at the time he was sentenced and 29 years of age at the time he committed these offences;
- He had received formal education up to grade 5;
- He was not gainfully employed;
- He did casual jobs at times and earned R50 per day;
- He was never married and he had no dependent children of his own save for his 3 minor siblings;
- His parents were no longer alive.

[47] In sentencing the appellant the following aggravating circumstances had to be taken into account:

- The victim was raped in her own house;
- The appellant knew the victim relatively well;
- The victim was his friend's mother;
- The adverse emotional impact of rape on the victim;
- The nature and gravity of the crime of rape coupled with housebreaking and armed robbery;
- The appellant did not act alone;
- The appellant's companion also raped the victim;
- The two men were armed with a knife;

- The appellant assaulted the victim and threatened to stab her to death;
- The victim was robbed of her belongings.

[48] The appellant was treated as a first offender since he had kept a clean criminal record for a period longer than 10 years immediately preceding the incident we are here dealing with. The court *a quo* reckoned that those circumstances substantially compelled deviation from the prescribed minimum sentence. I have reservations about that even though we cannot interfere with that finding.

[49] The evidence revealed that the appellant was not alone in it. He raped the victim. His companion supported him. He produced a knife with which the victim was threatened and her resistance broken. When the appellant was done his friend raped the victim - section 3 Sexual Offences and Related Matter Act 32 of 2007. Therefore, it will be readily appreciated that the victim was raped by more than one person. The combined actions of the two men brought their actions squarely within the purview of rape (a)(ii) at least – see Part 1 of Schedule 2 read with section 51(2)(a). The prescribed minimum sentence in those circumstances is life.

[50] The question is: Was the accused accordingly informed? The record showed that neither the written indictment nor the trial court specifically warned the appellant about the correct sentencing regime applicable to him. It is unwise for the court to depend on an accused person's legal representative to explain those provisions. The appellant can count himself

lucky. He was charged and tried as if he had committed rape as contemplated in Part III, Schedule 2 read with section 51(2)(b) which attracts the prescribed minimum sentence of 10 years imprisonment. In inquiring whether substantial and compelling circumstances existed in the instant matter, the benchmark used was 10 years imprisonment. I am of the view that, on the facts, no deviation from that prescribed minimum sentence was justified as regards the charge of rape. As regards housebreaking with intent to rob and robbery with aggravating circumstances I consider the deviation to be in order.

[51] A sentence of eight years imprisonment for rape in those circumstances was very lenient. Moreover, the court directed that the appellant serve the two sentences concurrently. In my view none of the individual sentences nor the effective sentence was shockingly severe and thus inappropriate. In my view no case has been made out to warrant any interference on appeal. That much Mr Makhene honourably conceded. In the absence of any material misdirection adverse to the appellant, we are not at liberty to interfere. Therefore, I am inclined to dismiss the appeal as regards sentence as well.

[52] Accordingly I make the following order:

50.1 The appeal fails *in toto*.

52.2 The conviction and the sentence are confirmed.

M. H. RAMPAL, J

I concur.

H. MURRAY, AJ

On behalf of the appellant:

Adv. J. S. Makhene
Instructed by:
Justice Centre
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On behalf of the respondent:

Adv. M. Strauss
Instructed by:
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