

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

Appeal No.: A93/15

In the appeal between:

RALOBISI FINGER

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J *et* FISCHER, AJ

HEARD ON: 17 AUGUST 2015

DELIVERED ON: 4 SEPTEMBER 2015

MOCUMIE, J

[1] This appeal turns on the reliability of identification evidence. On the night of January 2014, the complainant was home with her four year old daughter, sleeping, when two unknown men broke into her house, raped her and robbed her of a cell phone, earrings and R200 cash. The two men only left after both had raped and robbed her. She waited until dawn to report the incident to her mother not far from her house. The matter was reported to the police. The appellant's erstwhile co-perpetrator known as Sello was arrested first. He pleaded guilty and was convicted as charged on both counts and sentenced accordingly. The appellant was initially arrested but released because, according to him, the police did not have a case against him. The investigating officer was not called to put the circumstances under which the appellant was arrested on record.

[2] On 30 August 2012, the appellant was convicted of housebreaking with intent to rape and rape read with s51 (1) (a) of the Criminal Law Amendment Act 105 of 1997 as amended (the Criminal Law Amendment Act) and robbery with

aggravating circumstances as read with s1 of the Criminal Procedure Act 51 of 1977 (the CPA) by the regional court, Virginia. There were only two State witnesses: the complainant, and her husband. The appellant pleaded not guilty and offered an alibi in his plea explanation in that at the time of the commission of these offences he was at his home sleeping. He thereafter testified in his own defence and denied any involvement in the commission of the two offences. The regional magistrate (Mr Ludidi) convicted him on both counts. Applying the minimum sentence provisions of the Criminal Law Amendment Act, he sentenced the appellant to 25 years imprisonment, instead of life imprisonment as the Act prescribed in these circumstances, i.e rape by more than one person. He was sentenced to 6 years imprisonment on robbery with aggravating circumstances. The trial court made no order that the two sentences run concurrently.

- [3] The complainant was the sole witness to both offences. She testified that she was asleep in her house with her four year old daughter. Sometime around midnight she heard the kitchen window pane breaking and went to investigate. Her husband was not home. As she entered the kitchen, she saw an unknown man standing inside the kitchen next to the kitchen table. One - whom she identified as the appellant - ordered her to keep quiet and moved closer to her brandishing a knife. He reached her and put the knife on her neck threatening to stab her if she made any noise. While appellant was holding her the second man whom she identified as Sello- came into the house through the door. The complainant asked them to take anything they wanted but the appellant told her they wanted nothing but 'the vagina' meaning to have sexual intercourse with her.
- [4] The appellant pushed her towards the bedroom and onto the bed in which her daughter was sleeping. She pleaded with him not to do anything to her in front of her daughter. He pushed her back to the kitchen where he ordered her to lie down on the floor. He took out his private parts but realised that the complainant

was menstruating. He sent his cohort to go out and fetch condoms. The cohort left the house and immediately came back with condoms and gave him one. He put it on and penetrated her. Once the appellant was done, he climbed off the complainant and went towards the stove demanding food. The second man instructed her to kneel down so that he could penetrate her from behind but he could not. He turned her around and penetrated her while she was on her back on the kitchen floor. The appellant was then eating meat from the pot. The complainant's daughter came into the kitchen crying and asked them what they were doing to her mother. The second man threatened to rape her as well. But the appellant intervened, picked the child up and continued to eat from the pot.

- [5] The appellant came to stand between the complainant's thighs and demanded jewellery from her. She told him she did not have any. He there and then removed the earrings from her ears and removed the pillow under which he found R200 cash and a cellphone. He took them and handed the cellphone over to his cohort and instructed the complainant to show him how the cellphone was switched on and off. She did that. Both then left taking with them the earrings, R200 cash and the cellphone.
- [6] The complainant testified that she had ample opportunity to identify the two men who broke into her house and raped and robbed her. The complainant testified that she saw the appellant at close range several times, and had considerable time to look at him and was assisted by the light of the street light which shone into the house through the window and the curtain which was not so thick.
- [7] The complainant was emphatic on her identification. During cross-examination she stated that not only did she have time to look at them thoroughly, assisted by the light that shone into the house through the kitchen window but she had physical, verbal and eye contact with them. As she put it 'I will never forget his face. Even if I had to die and come back I will never forget his face...' What is more, as the

regional magistrate pointed out in his judgment, the complainant was a good witness: clear, coherent, specific and verbally expressive.

- [8] The only issue which the trial court had to determine was whether the appellant was the person who raped the complainant together with Sello, the person who had already pleaded guilty. This is the same issue this court must determine.

THE LAW

- [9] In *S v Mthetwa*¹, the Appeal court stated:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v. Masemang*, 1950 (2) S.A. 488 (A.D.); *R. v. Dladla and Others*, 1962 (1) S.A. 307 (A.D.) at p. 310C; *S. v. Mehlaphe*, 1963 (2) S.A. 29 (A.D.)'

- [10] In *S v Charzen*² Cameron JA, writing for the majority stated the test as follows:

'[11] But, as our courts have emphasised again and again, in matters of identification, honesty and sincerity and subjective assurance are simply not enough. *There must in addition be certainty beyond reasonable doubt that the identification is reliable*, and it is generally recognised in this regard that evidence of identification based upon a witness's

¹ *S v Mthetwa* 1972 (3) SA 766 (A).

² *S v Charzen and Another* 2006(2) SACR 143 (SCA).

recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution.' (My own emphasis)

[11] In this court, before us, with reference to case law³, Mr Makhene submitted that visibility was not so clear; although the complainant may in all probability be sincere and honest on who she believed she saw in her house that night, without more there was no guarantee of the correctness of that evidence. This is so when one considered that she was woken up in the middle of the night only to find strangers in her house, she was conscious of the attackers' threat to rape her four year old daughter and was raped by two people who she did not know prior to the incident. The allegation that she knew the appellant prior to the incident was contradicted by the fact that she did not tell the police that she knew the appellant prior to the incident or that she had seen him in the township in a section called Caprivi as she later testified in response to a question during cross examination. Mr Makhene submitted that the introduction of this evidence only when she was cross examined pointed to an attempt on the part of the complainant to strengthen her case. He implored us to disregard that part of her evidence.

[12] Mr Makhene's submissions were based entirely on the possibility of misidentification and the danger of a wrong conviction. He contended that had the State called Sello as a witness as he had already admitted guilt on the same incident, the State's case would have been strengthened. He contended that without more, the evidence of the complainant as a single witness did not satisfy the requirements set out in s208 of the CPA⁴. The complainant even failed to inform the police or her husband of the identity of the appellant on the same night of the incident or shortly after the incident had happened and was still fresh in her mind.

³ *S v Mthetwa* 1972 (3) SA 766 (A), *S v Charzen and Another* 2006(2) SACR 143 (SCA), *R v Mokoena* 1956 (3) SA 81 (A).

⁴ Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted on the evidence of a single witness whose evidence is satisfactory in all material respects.

- [13] In coming to the conclusion he came to, the regional magistrate was alive to the possibility of misidentification and drew much from precedents including *S v Mthetwa*⁵.
- [14] The transcribed record indicate at least ten instances in which the complainant was in physical, verbal and even eye contact with the appellant. Those are (a) When the appellant walked towards her brandishing a knife. (b) When appellant came next to her and put a knife on her neck ordering her to keep quite. (c) When appellant pushed the complainant into her bedroom onto the bed. As she lay on the bed, it must be assumed, it was on her back, as there is no other evidence indicating how she landed on the bed. (d) When the complainant asked the accused not to rape her in front of her four year old daughter, which he obliged not to do. (e) When the appellant took her to the kitchen where he instructed her to lie on the floor, which she did. (f) When the appellant instructed her to lie on the kitchen floor. (g) When the appellant sent his cohort to go and fetch a condom(s) and remained behind with the complainant. (h) When the appellant put on the condom. (h) When the appellant raped her on the kitchen floor. (i) when the appellant stood between her thighs and removed earrings from her ears and took her cell phone and R200 from underneath the pillow (j) When the appellant handed over the cellphone to his cohort for her to show his cohort how the cellphone switched on and off.
- [15] It is correct that *Mthetwa* and *Charzen* emphasise the importance of ensuring that wrong people are not convicted. That more is expected of an identifying witness than sincerity. I am however certain that the Supreme Court of Appeal has not laid down hard and fast rules that should be adhered to even when such adherence dispels common sense.
- [16] In this case the complainant had more than ample time to identify her rapists in the plus minus forty five minutes they were inside her house. It is common

⁵ Footnote 1 and 2 above.

knowledge that an RDP house is not so big as to have allowed these two men to wander off at some point or another into other parts of the house where she would not have been in direct contact with them. Both the appellant and his cohort did not even introduce such a possibility during the trial. Neither did Mr Makhene argue that. But the point is this, there was no such possibility. The fact that the complainant could not give an exact description of the clothing of the rapists or their exact facial features does not mean she could not identify both and more so the appellant. As she testified he was the first person she found in the kitchen. He was the one who constantly gave her instructions on what to do. He was the first one to rape her. He was the one who stood between her legs with her daughter in his arms and removed the earrings from her ears. He held the daughter in his arms in a sadistic manner thereby prevented his cohort from carrying out his threat of raping her. In the complainant's own words she said 'Even if I had to die and come back, I will never forget his face.' That is more telling than any formulation of guidelines. The requirements of *Charzen* cannot discard this reality and overwhelming evidence.

- [17] I want to believe that *Charzen* and cases that followed thereafter set out guidelines to follow in the evaluation of evidence of identification especially by a single witness. The same cases do not suggest that such guidelines should be applied in each and every case strictly; regardless of its own circumstances, as hard and fast rules; to the extent that if one of them is found not to exist, without more, the evidence of identification should be discarded.
- [18] Courts are not to follow a tick box method to determine whether the state has proved the identity of an accused beyond reasonable doubt. Otherwise the process becomes very technical and devoid of the common logic that the complainant indeed had ample opportunity to identify her assailants; just from listening to her attentively as the trial court clearly did in this case; despite it not noting the individual instances she had to do so as this court has done in para 14 of this judgment.

[19] Mr Makhene's argument that the failure to call Sello as a state witness weakened the State's case should be considered in the context of this case. In this case one suspect was arrested before the other and he pleaded guilty. The case was disposed of by the time the appellant was arrested. Ordinarily, the State can use such convicted person to testify against the other. But this will depend mainly on whether the State had such an agreement with him and struck a deal of some sort based on such agreement, alternatively the convicted person, out of his own, offered to testify against his cohort. In this instance there is no indication that the State had such arrangements in place. The defence cannot be heard to throw aspersions on why the State failed to do so, including that there was likelihood that the erstwhile cohort would not have corroborated the State's case. However, by the same token, immediately upon the defence's realisation that the State was not going to call Sello, surely it was open to the defence to have called him as a witness, particularly because the appellant's defence was a bare denial without any story to tell and because he and Sello were well known to each other; they played soccer together. Sello could have come to court and told the court that he was not with the appellant on the night he raped the complainant. In other words although the onus rested on the State to prove its case beyond reasonable doubt, there was no obligation on the State to close every avenue possible in order to do so. It did not mean that any onus was placed on the appellant to prove his case. But logic dictated that if he was not with Sello, he should have called Sello as a defence witness to say so. The defence had the same responsibility to put all the evidence before the trial court to enable it to come to a just decision and not convict a wrong person.

[20] Was the trial court correct to convict the appellant on armed robbery when, according to Mr Makhene, the evidence did not show that the complainant was still under threat of a knife when she was robbed of her cellphone, R200 and earrings? Mr Makhene submitted that at the time the robbery was allegedly committed, the complainant was no longer under any threaten. If anything the

perpetrators should have been convicted of theft. Robbery consists of theft of property by unlawfully and intentionally using violence to take the property from somebody else or threats of violence to induce the possessor of the property to submit to the taking of the property. Robbery read with section 1 of the Criminal Procedure Act 51 of 1977 reads:

'(1) In this Act, unless the context otherwise indicates"

aggravating circumstances", in relation to

(a)

(b) robbery or attempted robbery, means

(i) the wielding of a firearm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether *before or during or after the commission of the offence*. (My own emphasis)

[21] The section is clear and self-explanatory. It was unrefuted that the appellant brandished a knife from the moment he broke into the complainant's home; that at all times even during the rape he had the knife literally next to her. In my view, the wielding of such a dangerous weapon subdued the complainant to do whatever the appellant demanded from her, including when the complainant was dispossessed of her earrings, R200 cash and a cellphone. Authorities abound on this approach. The trial court did not err on this at all. The conviction ought to be confirmed.

[22] Having said that, there is no reason to interfere with the factual findings of the trial court. There is no doubt that the trial court was correct in its approach and in accepting the State's case as proved beyond reasonable doubt and rejecting the appellant's version. The convictions ought to be confirmed.

[23] On the sentences, Mr Makhene, could not make any submission that the trial court erred in considering appropriate sentences or that it erred by

overemphasizing any of the basic sentencing factors :the seriousness of the offences ,the personal circumstances of the accused and the interests of society. Suffice to submit that, the trial court was at large to have ordered the sentences to run concurrently. Mr Strauss, on behalf of the State, conceded that this was a case in which the trial should have ordered the sentences of one count to run concurrently with the other. This court is at large to reconsider sentence afresh to that extent only.

[24] The appellant was a first offender .He is unmarried and has no children. Although he displayed no remorse during the trial and neither was any suggestion made to that effect before us, when a court imposes sentences, it is duty bound to temper the sentence with mercy. Such tempering will ultimately lead to a just sentence that fits the crime, the accused and the society. The way of doing that, is *inter alia* through ordering the concurrent running of the sentences. This case is a typical one in which such order should have been made. The two offences were committed during the same incident. To that extent the appeal ought to succeed partially.

[25] In the circumstances, the following order is granted.

ORDER

1. The appeal against the conviction in respect of count 1 and count 2 is dismissed.
2. The appeal against the sentence in respect of count 1 and count 2 is upheld, partially and substituted with the following :
 - '1. Count 1 the accused is sentenced to 25 (twenty five) years imprisonment.
 2. Count 2 the accused is sentenced to 6 (six) years imprisonment.
 3. In terms of s280 (2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed in count 2 runs concurrently with the sentence imposed in count 1.
 4. In terms of s282 of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed is ante dated to ...'

B. C. MOCUMIE, J

I concur,

P. FISCHER, AJ

On behalf of the appellant:
Instructed by:

Adv. O Makhene
Legal Aid Free State
BLOEMFONTEIN

On behalf of the respondent:
Instructed by:

Adv. AS Chalale
Director of Public Prosecutions, Free State
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