

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal Number : A194/2013

In the appeal between:-

MPHIKELEDI JAMES MANTSOE

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* DAFFUE, J

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON:

10 SEPTEMBER 2015

[1] The appellant was accused 3 in the Court *a quo*. The appellant and the other two accused were charged with two charges, namely, charge 1, robbery with aggravating circumstances and charge 2, rape. It was alleged that on 17 February 2006 and at or near Ficksburg the appellant and the other two accused robbed the first complainant, David Motsoabodi, of a cell phone to the value of R599.00. In

charge 2 it was alleged that the appellant and the other two accused raped the second complainant, N. E. M. on the same date as mentioned in charge 1.

- [2] The appellant and the other two accused enjoyed legal representation during the proceedings in the Court *a quo*. They all pleaded not guilty to the aforesaid charges and gave no plea explanation. They were however all three convicted on the said charges and sentenced as follows:

2.1 Charge 1, 10 years imprisonment; and

2.2 Charge 2, 18 years imprisonment.

The Court *a quo* ordered that the said sentences were to be served concurrently.

- [3] The appellant successfully applied to the Court *a quo* for leave to appeal against his convictions only.
- [4] The complainant in charge 1, Mr Motsoabodi, testified that the night of the incident at about 24h00 he and the complainant in the second charge, Me M., were walking

together from the hall after a school bash. They saw four men approaching them, one of whom walked in front of the others. The man in front passed them, but the other three approached Mr Motsoabodi. One of them pointed a firearm at him and one of the three men took his cell phone and an amount of money from him. In the process they assaulted him by kicking him with booted feet and hitting him with their fists, whilst the one with the firearm was poking him with it and banging it against his head. In the meantime the man who had been walking in front, held Me M.. After that the four men left, taking Me M. with them.

- [5] According to Mr Motsoabodi the incident happened in the street at a T-junction where the immediate area was well lit to the extent that he was able to see what was happening. At the time of the incident he identified accused 2, known as Doctor, to have been the person who walked in front and who held Me M.. Doctor was well-known to him as they were related and they also attended primary school together. Due to the chaotic situation and because he was scared, Mr Motsoabodi was however not able to identify the other assailants. He was also not able to say which assailant held

the gun and which one took his cell phone.

[6] After their assailants left with Me M., Mr Motsoabodi went to his parental home and his brother accompanied him to the tavern in the vicinity from where the assailants appeared earlier. At the tavern they enquired who accompanied Doctor to the tavern earlier and the names of three people were mentioned, namely Tswimpi, Mothalo and another whom he could not remember. According to Mr Motsoabodi, Tswimpi is accused 1. They then went back to their parental home. The following morning Mr Motsoabodi went to Me M.'s parental home where he was informed that she had not yet returned home. He went back home. Later the police arrived at his home, together with Me M..

[7] The complainant in charge 2, Me M., testified that Mr Motsoabodi was her boyfriend at the time. She gave a similar description to that of Mr Motsoabodi as to how their assailants initially approached and attacked them, also confirming that one of the assailants had a firearm and that he pointed it at Mr Motsoabodi. She further confirmed the robbery of the cell phone. She however testified that Mr Motsoabodi was only assaulted with open hands. The four

men then took her to the stadium. On their way they assaulted her, threatening her not to lay charges against them. At the stadium one of them told her to undress. When she refused, he hit her with an open hand. She then took her jeans off and the same man undressed her panty and forced her to lie on her back. The four men put on condoms and each one of them raped her by having sexual intercourse with her without her permission. When they had finished, she got dressed and they told her to leave. She indeed left.

- [8] On her way she met an unknown man who enquired from her why she was crying. She told him that she had been raped by unknown men. He then carried her on his back till next to the hall, where he phoned the police. The police came and took her to the police station and afterwards to hospital.
- [9] According to Me M., it was dark where they met with the four assailants and it remained dark up to the point where they raped her. She did not know her assailants and she was also not able to identify any of them.

[10] The State also called Mr Maroke as a witness, who is the aforesaid person who assisted Me M.. His evidence corroborated that of Me M.'s. Of importance is his evidence that she told him that she had been raped by four men who are unknown to her. He further testified that he phoned both the police and the ambulance services, but neither had vehicles available. Whilst they were still standing at the public phone, a police vehicle incidentally passed the scene and he attracted the attention of the police officers. He then explained to the said police officers that Me M. had been raped, whereafter they took her with them in the police vehicle.

[11] Mr Maroke then left heading home. Whilst on his way, he met four men, whom he identified in Court to be the three accused and one other person, who has since passed away. He knew them quite well. The appellant he knew as a friend of accused 2. An apollo light was providing light in the area where he met them and he could see them clearly. When he had already passed them, accused 2 (whom he also referred to as 'Doctor') called him and enquired what happened to cause the police to have been with him. He responded by

explaining that he assisted a woman who had allegedly been raped. Mr Maroke then continued walking on, but when he looked back, he saw that the four men were running after him. He became suspicious that the four men could be the persons that had raped Me M. and he therefore ran away. He testified that the place where he met the four men was about 250 metres from the stadium and that it was at about 23h00 or before 24h00.

[12] Sergeant Mosese testified that she is the investigating officer and because Me M. said that her assailants had used condoms, she went to the alleged rape scene at the stadium to look for condoms. She found three used condoms at the scene. She also testified about the chain evidence pertaining to the forensic analysis of the condoms, as well as regarding a crime kit pertaining to Me M. which she received from Inspector Ntholi. After the arrest of the three accused and a suspect who has since passed away, their blood samples were taken and also sent for DNA analysis.

[13] She also testified that accused 2, Doctor, was arrested as a result of a witness who had identified him as one of the

assailants. She then enquired from an informant in whose company Doctor was that evening, as a result of which the other two accused and the deceased suspect were arrested.

- [14] Captain Mashegoana, attached to the biology unit of the Forensic Science Laboratory as a Senior Forensic Analyst and a Reporting Officer, was also called as a witness. The crux of his evidence was that according to the DNA analysis, the STR profile of the DNA obtained from the blood sample of accused 1 is the same as the STR profile of the DNA obtained from the anorectal swabs taken from Me M.. The question was posed to him that considering that it is being alleged that the three accused as well as the deceased suspect all raped Me M., whether the DNA results mean that she had in fact not been raped by the other persons as well. He responded as follows:

“There are some other factors that normally contribute and to us getting this kind of results.... Number one; it might be that yes, they did not contribute at all. Or else they did participate but used condoms. Or they did participate but they did not ejaculate. Or they participated, they ejaculated, but outside the vagina of the victim. Or sometimes there are instances where

the person has got a condition that is called aspermic, he does not produce sperm. And you know, that kind of situation normally happens to those people who do vasectomy. They are aspermic. They do not produce sperm anymore.” (sic)

- [15] In view of the fact that the identity of the perpetrators is in issue, it is necessary to have regard to the version of all of the accused and not only that of the appellant. According to accused 1, he went to Shoprite in town on the day of the incident. He was sent there by his mother to buy groceries and he also used to assist people at Shoprite with loading their groceries into their cars. There he met accused 2 and the appellant at about 12h00 the afternoon. The three of them left town at about 16h00 and went to Sun-Cell at the border post. There they had drinks together. At about 18h10 he accompanied the appellant to where he boarded a taxi heading to zone 8. Accused 1 thereafter also boarded a taxi to zone 3. Accused 2 remained behind. Accused 1 reached home at about 18h30 and he spent the rest of the evening and night at home. He was unable to give an explanation regarding the seemingly positive DNA results. Accused 2 is his friend. According to accused 1, he knew the appellant from Shoprite, but they were not

friends, only acquaintances. He confirmed that he knew Mr Motsoabodi as their mothers were friends. The two of them also attended school together in the same class. He denied any knowledge of or involvement in the incident.

[16] Accused 2 testified that on the day of the incident he met accused 1 and the appellant at Shoprite. At about 16h00 they went to Sun-Cell at the border post where they had drinks together. Accused 1 and the appellant left the place together, but he remained there until they closed, whereafter he left together with a girl named Meme. According to accused 2, accused 1 and him are not friends. They just know one another because he accompanied his mother when she went to visit the mother of accused 1. He did not know the appellant, as they met for the first time at Shoprite on the day of the alleged incident.

[17] Although he knows the first complainant as they are related, they had a bad relationship as a result of a dispute regarding cattle. He confirmed that he knows Mr Maroke, as he was a police informant. There has never been any bad incident between Mr Maroke and himself.

[18] The appellant testified that he is from Ekangela outside Pretoria and he was only visiting in Ficksburg. He arrived in town on the day of the alleged incident in the company of Butsho, who is his sister's neighbour. Butsho at the time also assisted with the parking of vehicles at Shoprite. Whilst they were there, Butsho unexpectedly left with people who were looking for employees to perform odd jobs. When he left, he told the appellant to ask accused 1 to take him to Sun-Cell. When accused 1 arrived, the appellant posed the request to him, but accused 1 initially refused, although he then eventually agreed. The appellant had to wait for accused 1 whilst he was still busy assisting with the parking of vehicles. Whilst waiting, accused 2, who was not known to him, arrived and assisted accused 1. At about 16h00 accused 1 said that he will quickly take the appellant to Sun-Cell and accused 2 then said that he was going to accompany them. At Sun-Cell they bought two black labels. After they drank about one and half thereof, the appellant developed a headache. He then requested accused 1 to take him halfway to show him the taxis at the bridge. It was about 18h00 when he boarded a taxi to his

sister's place at zone 8. When he arrived there at approximately 19h00 his sister gave him food, he drank pills for his headache and then went to sleep. He slept through the night.

[19] According to the appellant Mr Motsoabodi is unknown to him and he saw him in Court for the first time. He does not know MeM. either. Mr Maroke is also unknown to him.

[20] Mrs Smit, appearing on behalf of the appellant, pointed out that it was only Mr Maroke who identified the appellant, as none of the other witnesses were able to do so. Mr Motsoabodi was only able to identify accused 2 (Doctor). Mr Maroke is therefore a single witness regarding identity. Mrs Smit also submitted that even if it was to be found that the appellant was indeed on the scene together with the other accused and the deceased suspect as testified by Mr Maroke, it is not the only reasonable inference that the appellant was indeed one of the assailants. In this regard Mrs Smit referred to the evidence of Mr Maroke on p. 30, lines 22 to 23 of the record, where he testified that after he made the phone call to the police, they “stood there for a

longer time” before a police vehicle incidentally came towards them. Mrs Smith therefore contended that it appears that there had been a lapse of time between the attack and the rape incident and the time when Mr Maroke came across the appellant and the other three men. She therefore submitted that it is not the only reasonable inference that because the appellant was by then in the company of Doctor (accused 2), he was also one of the assailants and rapists. It was her contention that the mere fact that the appellant is attempting not to place himself on the scene as part of the group whom Mr Maroke came across, does not by necessity mean that he was one of the assailants and rapists.

- [21] Mr Roothman, on behalf of the State, submitted that the evidence should be considered in totality. In this regard, there were four assailants and rapists, which included Doctor, and shortly after the incident Mr Maroke came across four men, including Doctor, in the very same area as where the incidents took place. During this meeting the four men acted in a very strange manner after hearing why the police had been on the scene. Mr Roothman therefore

contended that the Court *a quo* correctly concluded that it was the appellant, the two other accused (and the deceased suspect) who committed the said crimes.

[22] The Court *a quo* dealt with the discrepancies between the evidence of Mr Motsoabodi and Me M. regarding the visibility at the time they met the four assailants and as to how Mr Motsoabodi was assaulted. Regarding the question of visibility the Court *a quo* found as follows in his judgment as reflected on p. 117, lines 2 to 11 of the record:

“There must, however, clearly have been some light for
N.:

- To have seen that there were four people;
- To have seen that one was walking in front carrying his shoes in his hands;
- To have seen that three were walking behind that one; and
- That one of them had a firearm;
- And also to have seen that Motsamai was robbed of his cell

phone.”

[23] As to the discrepancies in the evidence as to how Mr Motsoabodi had been assaulted, the Court *a quo* made the following findings, reflected on p. 117, lines 12 to 23 of the record:

“On how Motsamai was assaulted, the Court accepts the evidence of Motsamai. That while three people were, as he says, all over him the fourth went to N. and held her. N. also agrees that the people took her away. According to the evidence of Motsamai, N. would not have been able to concentrate on what was happening to Motsamai whilst somebody was holding her.

There are things, therefore, that might have been done to Motsamai that N. did not see because she was concentrating on the person that was holding her. The Court, therefore, finds that it cannot really be said that there are any serious contradictions between their statements.”

[24] In my view both of the above findings by the Court *a quo* are properly substantiated and cannot be faulted.

[25] The Court *a quo* gave accused 1 the benefit of the doubt regarding the DNA results, considering the contradictions in the evidence of Sergeant Mosese regarding the crime kit numbers allocated to the control blood samples of the respective accused; moreover so in view of the further contradictory information in the affidavit of one Inspector Mabaju in this regard, which was put to her during cross-examination on behalf of accused 2. There was no cross-appeal by the State regarding this finding of the Court *a quo* and therefore the appeal is dealt with without taking the DNA results into consideration.

[26] Both accused and the appellant confirmed in their evidence that they had spent time together earlier that day. They then however alleged that after they had drinks together at Sun-Cell, they split up and never met with one another that night.

[27] Although Mr Motsoabodi knows accused 1 by the name Tswimpi, he was unable to identify as him of his assailants. Mr Maroke however knew accused 1 as a person who usually assisted people with their groceries at Spar and he

therefore knew him from sight and usually greeted him when they passed one another. The Court *a quo* correctly pointed out that this was never disputed and that there was no suggestion of a possible motive for Mr Maroke to falsely implicate accused 1.

- [28] Both Mr Motsoabodi and Mr Maroke knew accused 2 well and both knew him by the name “Doctor”. Mr Motsoabodi and accused 2 are related and they attended primary school together. This was confirmed by accused 2, although he testified that they had a bad relationship as a result of a dispute over cattle. Accused 2 also confirmed that he knew Mr Maroke as he was a police informant and there have been problems between them. It should be noted that it was the evidence of Mr Maroke that there was an apollo light in the area where he met up with the four men and he was able to see them clearly. Mr Motsoabodi and Mr Maroke therefore corroborated each other’s evidence regarding accused 2’s presence in the vicinity of the attack at the approximate time of and shortly after the attack. This is in direct contrast to the version of accused 2 that he remained at Sun-Cell until its closure late night and then

went home.

[29] Mr Maroke was the only one who could identify the appellant. He testified that he knew him well as a friend of accused 2 and that the appellant and accused 2 used to be in each other's company. This evidence was not disputed and it was never put to Mr Maroke that the appellant was only a visitor and met accused 2 for the first time that day. As again correctly pointed out by the Court *a quo*, there was also no suggestion of any possible motive for Mr Maroke to falsely implicate the appellant.

[30] The Court *a quo* dealt with the fact that Mr Maroke was a single witness regarding the identification of the appellant (and accused 1), but found that he gave his evidence clearly and unambiguously and that his evidence passed the single-witness test. In my view there is no basis upon which this finding can be faulted.

[31] The vicinity where Mr Maroke met the two accused, the appellant and the deceased suspect was according to him about 250 metres from the stadium. It was about 23h00 or

before 24h00, which time roughly corresponds with the estimates of the other witnesses. Their presence was therefore, both in time and in space, very close to where the two crimes had been committed. In addition to the aforesaid, the reaction of accused 2 and the other three men, including the appellant, after having heard why the police had been on the scene, was very suspicious.

[32] In the totality of the circumstances and especially in the absence of an explanation by the appellant for his presence when they met with Mr Maroke, necessitates as only reasonable conclusion that the appellant, together with the two other accused and the deceased suspect, were the assailants of Mr Motsoabodi and rapists of Me M..

[33] The appeal against the convictions of the appellant is therefore dismissed.

C. VAN ZYL, J

I concur:

On behalf of the Appellant:

Adv L Smit
On instructions of:
Legal Aid Board
BLOEMFONTEIN

On behalf of the Respondent:

Adv JW Roothman
On Instructions of:
Office of the Director of
Public Prosecutions
BLOEMFONTEIN