

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

Appeal No.: A215/2012

In the matter between:

TSHEPO VINCENT SENOKOANE

Appellant

and

THE STATE

Respondent

CORAM:

LEKALE, J *et* NAIDOO, J

HEARD ON:

3 FEBRUARY 2014

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

6 FEBRUARY 2014

- [1] On the 11th April 2011 the appellant, who was legally represented, was convicted on one count of attempted rape as charge number 2 and one count of rape as charge number 3 by the Regional Court at Bloemfontein. He was, eventually, sentenced on the 30th May 2011 to three years for attempted rape and fifteen years for rape on the basis that he was a repeat rape offender. The sentences were not directed to run

concurrently. He felt aggrieved by both the conviction and sentence on the rape charge and, eventually, secured leave from the trial court to appeal the same. He accordingly now approaches us on appeal.

- [2] On returning the guilty verdict the court below accepted the evidence of the complainant, who was a single witness, and effectively rejected the appellant's version that he did not rape the complainant as not being reasonably possibly true. The court *a quo* further found that although the area where the rape was committed was dark, the complainant was able to identify the appellant as the rapist because he knew him, he also knew his voice and he had the opportunity to see him because the appellant was very close to him when he demanded sexual intercourse.
- [3] The appellant's notice of appeal is not part of the record and as such his grounds of appeal are not apparent *ex facie* the same. Mr Reyneke, who appeared for the appellant on Legal Aid South Africa brief, requested that the appeal be finalised in the absence thereof in the light of numerous previous postponements granted for the purpose of reconstructing the record. The heads of argument filed for and on behalf of the appellant provides sufficient exposition of the sources of the appellant's grief and we are, thus, able to deal effectively and properly with the matter.

[4] In the heads of argument the appellant's tilt at the conviction is effectively directed at his identification as the offender and the fact that the complainant was a single witness whose version lacked corroboration and is further, according to him, not reliable. The State, on its part, does not support the conviction and is silent on the sentence in the heads of argument with Mr Zweni volunteering that the issue of identity was never dealt with extensively during the complainant's testimony and conceding that there exists doubt as to whether proper identification had been made. He, further, castigates the prosecutor for not disputing the appellant's version in cross-examination.

[5] In matters of identification, as Mr Reyneke correctly submits, honesty, sincerity and subjective assurance do not suffice. The identification must be reliable beyond reasonable doubt and such evidence must be approached with caution.

See: **State v Charzen and Another** 2006 (2) SACR 143 (SCA) at par [11].

[6] The conviction is based on the evidence of the complainant who testified, *inter alia*, to the effect that he was [...] and he knew the appellant, as at the date of the rape, from the dumping site where they both worked. That on the fateful night around 2 am he was in the company of a female friend on their way home from a tavern where they had left the appellant. The

female friend was leading him and when she turned the corner he was grabbed from behind by the appellant. The appellant tripped him up and he fell down. He screamed but the appellant muzzled him with his hand and, when he removed it and screamed, the appellant throttled him. The appellant, thereafter, undressed him by removing his pants. The appellant, thereupon, inserted his penis into his anus. After raping him, the appellant left him on the ground and ran away. Although it was dark he saw the appellant's face when the latter throttled him. He, further, recognised the appellant's voice when the latter warned him that if he did not want to allow him sexual favours he was going to kill him. He was drunk but he was conscious of what was happening around him. He had earlier been enjoying alcoholic beverages with the appellant and others at the tavern. He never had a love relationship with the appellant.

- [7] The question in this appeal is whether or not there is certainty beyond reasonable doubt that the complainant's identification of the appellant as the rapist is reliable. It is clear from undisputed evidence that the appellant and the complainant knew each other and that they were together shortly before the incident. It is, further, indisputable that when a person throttles another they get to be in close proximity to each other. It was further not in dispute that the complainant knew the appellant's voice. It is, furthermore, implicit from the complainant's evidence that, although the area was not lit, people could still walk and were,

as such, able to see their way through the darkness. The complainant's evidence to the effect that, although he was drunk, he was alive to his surroundings was not disputed.

- [8] The fact that the scene of the crime was dark increases the risk of a mistaken identification in the light of the appellant's defence that he did not rape the complainant. The fact that the complainant knew the appellant reduces such a risk and so does the fact that the complainant was *au fait* with and could recognise the appellant's voice. Although the complainant's inebriety at the relevant time further increases the risk of wrong identification, the fact that the complainant was, undisputedly, conscious of his surroundings, in my view, neutralises such a risk in the absence of any evidence to the contrary.

See: **R v Dladla and Others** 1962 (1) SA 307 (AD) at 310 paras C – E on the role played by prior knowledge of the offender in identification.

- [9] The question is whether or not there is a reasonable doubt that the complainant was correct in his identification of the appellant as the rapist. In my view the issue in the instant matter turns around the opportunity the complainant had to make a positive identification regard being had to the darkness in the area as well as his state of inebriety. This aspect of the complainant's evidence was not tested at all. Although he testified that he saw the appellant's face when the latter strangled him, it was

not established and it is, as such, not apparent *ex facie* the record how long he held the appellant's face under observation in order to recognise and identify him.

- [10] It is, thus, in my view not certain beyond reasonable doubt that the complainant had ample time and opportunity to identify the appellant as the offender. We are, thus, in respectful agreement with counsel on both sides that the trial court erred when she found that the complainant had the opportunity to identify the appellant as the rapist at the time the demand for sex was made. For the court below to conclude and be satisfied beyond reasonable doubt that the complainant, in fact, had such an opportunity it was imperative, in my judgment, for the State to adduce evidence on the duration of the complainant's observation of the appellant's face. Absent such evidence it cannot be said, in the circumstances of the instant matter, that the State proved its case against the appellant beyond reasonable doubt. The conviction and sentence on the attempted rape charge can, however, not be faulted.

ORDER

- [11] The appeal succeeds and both the conviction and sentence on charge 3, namely rape, are set aside.
- [12] The conviction and sentence on charge 2 are confirmed.

[13] The order relating to section 103 of Act 60 of 2000 remains in place.

L. J. LEKALE, J

I concur.

S. NAIDOO, J

On behalf of appellant:

Adv J.D. Reyneke
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv L. Zweni
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN