

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

Appeal No.: A33/2010

In the appeal between:-

MOLALHLWE MOLALHEHI

Appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et* MOTLOUNG, AJ

HEARD ON:

10 FEBRUARY 2014

JUDGMENT BY:

VAN DER MERWE, J

DELIVERED ON:

13 FEBRUARY 2014

- [1] The appellant was convicted in the regional court of rape and sentenced to life imprisonment. He appeals against the conviction and sentence. As the appellant was sentenced between 1 January 2008 and 1 April 2010, he did not require leave to appeal. See **S v Alam** 2011 (2) SACR 553 (WCC), approved in **Chake v S** (824/2012) [2013] ZASCA 141 (30 September 2013).

- [2] The appellant and the mother of the complainant lived together as [.....] for a number of years. The complainant was born on the [.....]. In June 2008 she was therefore [....] years of age. The appellant and the complainant's mother had two younger children together.
- [3] According to the complainant she was raped by the appellant on many occasions. The trial court, however, convicted the appellant only of rape that took place on either 11 or 12 June 2008.
- [4] It is common cause that on the morning of 12 June 2008 the appellant accused the complainant of being involved in a housebreaking that took place at the house where the family resided. This resulted in an altercation between the appellant and the complainant. Later that same morning the complainant visited a mobile clinic and was then sent for forensic examination which commenced at 16h45 on the same day. The examiner found superficial abrasions of the fossa navicularis at the five o' clock and six o' clock positions. The hymen was intact with no swelling, bruising or injury whatsoever.
- [5] The complainant was a single witness. The essential question therefore is whether despite the shortcomings, defects or contradictions in her testimony, the trial court should have been satisfied that the truth had been told. The evidence of the complainant contains serious defects. The most important illustration hereof is that in her initial evidence

the complainant made it very clear that her mother had no knowledge of the alleged continuous rapes at all. In later evidence however, she testified that on these occasions her mother in fact encouraged the appellant to have sexual intercourse with her and that on occasion her mother held her down and opened her legs to enable the appellant to rape her as well as closed her mouth to prevent her from screaming. This and other defects in her evidence were not satisfactory explained.

- [6] Relying on the evidence of the forensic examination, the trial court nevertheless convicted the appellant. In my judgment the trial court erred. The regional magistrate said that expert evidence given in other cases indicated that normally injuries would not be noted where a person had been raped more than 72 hours before the time of the examination and that it can therefore be safely assumed that the injuries were inflicted within 72 hours before 16h45 on 12 June 2008. This is not permissible. It is trite that unless judicial notice can be taken of a fact, a court can only rely on the evidentiary material in the specific case before it. The exact nature of the injuries and the time of infliction thereof certainly are not notorious facts of which judicial notice could be taken. It is also trite that the verdict in a criminal case must account for all the evidence in the matter. In this regard the trial court failed to take into account that despite the allegation of the complainant that she had been raped on several occasions and that there had been deep penetration, there was no injury to the hymen at all. This casts considerable doubt on

her evidence. In addition, on her own evidence, the complainant was clearly not raped on either the 11th of the 12th June 2008. It appears from the evidence that during the week the appellant stayed on another farm. According to the complainant the appellant arrived at home early on the morning of Thursday 12 June 2008 whereafter the said altercation took place and no sexual intercourse took place.

[7] In the result, whatever the merits or demerits of the appellant's denial of the charge against him, the trial court should have at least entertained a reasonable doubt as to the appellant's guilt.

[8] In the result the following order is issued:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

C.H.G. VAN DER MERWE, J

I concur.

S.E. MOTLOUNG, AJ

On behalf of appellant:

Mr P.L. Nel
Instructed by:

Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv S. Mthethwa
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

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