

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

Appeal No.: A10/2014

In the matter between:

TSHEDISO NICHOLAS NTSASA

Appellant

and

THE STATE

Respondent

CORAM: VAN DER MERWE, J *et* MBHELE, AJ

HEARD ON: 19 MAY 2014

JUDGMENT BY: MBHELE, AJ

DELIVERED ON: 12 JUNE 2014

[1] The appellant and two other people were charged with housebreaking with intent to rob and robbery and four counts of

rape. The appellant was convicted of housebreaking with intent to rob and robbery for which he was sentenced to 7 (seven) years imprisonment. He was also convicted of rape on the basis that he raped the complainant more than once and sentenced to 25 (twenty-five) years imprisonment. The sentences were ordered to run concurrently. Leave to appeal against the conviction and sentence was granted by the trial court.

- [2] The facts that led to the appellant's conviction as related by the state witnesses was that on 23 April 2011 the complainant's house was broken into by two male persons, who each raped her more than once and stole her property.
- [3] She was pushed to her bed, covered with blankets and raped four times by her assailants. While one of her attackers was busy having sexual intercourse with her, the other one called him by the name Tshediso. The incident happened at night. Only light that came from a mast light, situated about 175 metres from the complainant's house, illuminated the room.
- [4] The complainant identified the appellant as one of her assailants. She pointed out the appellant when she saw him in police company. It is not in dispute that the complainant was raped by two males and that her belongings were stolen.
- [5] The question to answer is whether the trial court correctly

convicted the appellant.

- [6] The state called Me P[...] M[...], who testified that the appellant arrived at her house selling items that according to her resembled those of the complainant. P[...] knows the appellant by name and calls him Tshediso. The complainant identified the items left at P[...]’s house as hers.

- [7] The appellant denied any involvement in the rape and robbery of the complainant. His version is that at the time of the incident he was sleeping at his parental home.

- [8] The correct approach when analysing evidence is that evidence must be considered in its totality. The Supreme Court of Appeal stated as follows in the case of **S v Chabalala** 2003 (1) SACR 134 (SCA):

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the

context of the full picture presented in evidence.

[9] In **S v Mbuli** 2003 (1) SACR 97 (SCA) Nugent JA said:

“It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford* 1937 AD 370 at 373, 383). In *S v Van der Meyden* 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.

‘...Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’”

[10] When analysing the facts in totality, the following comes to light:
The complainant was attacked by two male persons, one of

them is called Tshediso. Her description of this person was that he had a dark complexion, short hair and a moustache and that he wore a striped t-shirt, a leather jacket, jeans and tekkies on the date of the incident. It was not disputed that the appellant fits this description. Two weeks after the incident, the appellant was found in possession of items belonging to the complainant which he sold to P[...] M[...].

[11] Although the circumstances were certainly not ideal for observation the complainant gave a remarkably detailed description of her assailant and she immediately recognised him when she saw him again. This indicates that her identification of the appellant is reliable. In addition, the appellant was in possession of items stolen from the complainant, which he did not explain but falsely denied.

[12] When one puts all pieces of evidence together, a reasonable possibility of excluding the appellant as one of the assailants who broke into the complainant's house does not exist.

[13] The complainant, as a single witness, was both credible and reliable. In the result I am not convinced that the trial court erred in convicting the appellant.

AD SENTENCE

[14] It is trite that a court of appeal may not interfere with sentence

unless it finds that the trial court did not exercise its discretion judicially.

[15] The appellant's legal representative argued that the trial court overemphasised the interests of the community and the seriousness of the offence at the expense of personal circumstances of the appellant. I disagree. When sentencing the appellant the trial court considered all relevant factors and found that there are compelling and substantial circumstances that warrant deviation from the prescribed minimum sentence.

[16] I am of the view that the trial court did not misdirect itself. Given all the circumstances I am of the view that the sentence imposed is appropriate. It cannot be said to be a sentence that could not reasonably have been imposed in the circumstances.

[17] I therefore make the following order:
The appeal is dismissed and convictions and sentences are confirmed.

N.M. MBHELE, AJ

I concur.

On behalf of appellant:

C.H.G. VAN DER MERWE, J

Adv L. Smit
Instructed by:
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv S. Mthethwa
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN