

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A229/2013

In the appeal between:-

E[...] M[...] M[...]

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, J *et* WRIGHT, AJ

HEARD ON:

4 AUGUST 2014

DELIVERED ON:

8 AUGUST 2014

APPEAL

MOLEMELA, J

[1] This is an appeal against conviction and sentence. On 14 December 2011 the appellant was convicted by the Regional Court sitting in Bloemfontein on a charge of housebreaking with intent to rape and rape.

[2] The grounds of appeal directed at the appellant's conviction are that the court *a quo* erred by finding that the State proved its case beyond reasonable doubt and specifically insofar as it found

(i) that the identification of the rapist by the complainant was reliable, and

- (ii) that the DNA evidence served as objective evidence corroborating the complainant's version despite the fact that the official who had drawn the appellant's blood sample was not called as a witness.

[3] The salient facts giving rise to the appellant's prosecution and subsequent conviction are set out hereunder. The complainant, who was 14 years old at the time of the incident, testified that the appellant was well-known to her as he had a love relationship with her sister L[...] and fathered her child. On 30 October 2009 the appellant arrived at the complainant's home and found her with her friends, including D[...]. He asked for her sister. On learning that she was not there, he asked for a jersey belonging to his and L[...]’s son. When the appellant arrived, the complainant and her friends were outside the house. The main door of the house was locked and when the complainant tried to unlock it, she could not succeed. The appellant suggested that someone enter the house through the window of the pantry so that they could open the door from the inside. As L[...]’s boyfriend, the appellant knew that the window of the pantry did not close properly due to a latch that did not lock. The appellant helped a certain boy to jump into the pantry through the window so as to open the door from the inside. The door was opened and the complainant gained access and handed the appellant the jersey he was looking for and the appellant then left.

[4] In the evening the complainant locked the house and went to sleep. In the early hours of the morning she was awoken and discovered that somebody was on top of her. This person was also touching her vagina. She initially thought that it was her brother but later realised that it was not him. The person in question raped her. There was no lighting in the room and she could not see the assailant's face. She threw her assailant off her. She could also feel the piercing when the assailant was pressing down on her. When she touched him, she realised he had short hair. When the person was pressing down on her, she could feel that he had a piercing on his chin. She could smell the distinct smell of the appellant's perfume. It then dawned on her that the person raping her was the appellant. She decided not to make him aware that she had recognised him, for fear of being harmed.

[5] After raping her, the appellant tried to cover her with a mattress but she resisted, as a result of which she sustained injuries to her arm. She ran to the kitchen with the intention of stabbing her assailant with a knife. She managed to get to the kitchen, but her assailant overpowered her before she could get a knife. He then dragged her to the kitchen and bundled her into the wardrobe. He then fled.

[6] The complainant ran to D[...]’s house, where she reported that the appellant had raped her. D[...]’s grandmother then summoned the appellant’s mother, who in turn summoned the appellant. When the appellant arrived, the complainant repeated her accusation and alluded to the smell of the appellant’s perfume, which she picked up from his t-shirt. The appellant was arrested.

[7] Back at the house the police’s preliminary investigation at the complainant’s house confirmed that the house was still securely locked. The window of the pantry was wide open and there was a drum placed near the window. It was deduced that the assailant gained entry through the pantry window.

[8] D[...] testified and corroborated the complainant’s version. The appellant’s mother was called as a witness and she confirmed that after her arrival at D[...]’s home in the early hours of the morning, the complainant was adamant that the person that had raped her, was the appellant.

[9] Dr Adri Krieger testified that the complainant testified that the complainant reported to her that she was raped by her sister’s boyfriend. She further testified that the complainant had injuries to her private parts, which was consistent with forced penetration. She furthermore removed a swab from the vulva of the complainant and placed it into the evidence collection kit, which was thereafter handed over to constable Snyer.

[10] Warrant Officer Shane Lesley Whelan, a member of the South African Police Services assigned to the biology unit and forensic laboratory in Pretoria, testified that as an analyst, he received a case file marked Boshof CAS 51/10/09. He found that the DNA results, which was from the evidence collection kit marked 07D1AC9374XX Marumo P, matched the DNA sample that was sent to them marked IOD4AA5599EB M Modise. He also testified that positive and negative controls are run throughout the whole process to ensure that the profile obtained is the correct profile and this eliminated the possibility of a wrong result.

[11] The appellant testified and admitted having gone to the complainant's house to fetch his son's jersey earlier that day, but denied having gone there again later. He denied raping the complainant. He testified that at the alleged time of the rape he was at his home, sleeping.

[12] The appellant called his sister L[...] M[...] as a witness and she confirmed that the appellant was at home at the time of the alleged rape, having arrived at his home between 10 pm and 11 pm. The appellant's mother was also called as a witness.

[13] It is trite that the State bears the onus of proving an accused person's guilt beyond reasonable doubt. In **S v Shackell**¹ Brand AJA (as he then was) made the following comment:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

¹ 2001 (2) SACR 185 (SCA)

[14] Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. The Appeal Court in **S v Mthetwa**² per Holmes JA decided as follows regarding identification:

“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 of observation, both as time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, built, 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;”

[15] In **S v Charzen and Another**³ the Supreme Court of Appeal remarked as follows regarding pitfalls of subjective identification:

“There was, in addition, no physical evidence, such as fingerprints or recovered stolen property that could provide a measure of objective assurance against the pitfalls or subjective identification. The greatest assurance of guilt lay in such evidence, rather than in an identification on its own, which could be beset by error and misdescription.”

(Paragraphs [16] – [19] at 149b- h.)

[16] The court *a quo* was satisfied with the complainant’s evidence and was alive to the fact that her evidence needed to be approached with caution as she was a single witness. The court *a quo* was satisfied that the appellant had been reliably identified through his short hair, pierced chin and the scent of his perfume and accepted the DNA evidence to be objective evidence that

² 1972 (3) SA 766 (A) at 768 A – C

³ 2006 (2) SACR 143

served as assurance against a mistaken identification. The court *a quo* was satisfied that the DNA evidence was properly admitted into evidence.

[17] I turn now to the prosecution's failure to call the official who drew the appellant's blood sample as a witness. In the case of **S v TEIXEIRA**⁴ the court stated the following: "I think I am stating the obvious in saying that, in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities."

[18] While the prosecution should be criticised for not calling the official who drew the appellant's blood sample as a witness so as to complete the chain evidence in the face of a denial of all allegations, it must be taken into account and is of utmost significance to note that when warrant officer Whelan testified to having been handed a blood sample bearing the appellant's initial and surname, this was not disputed in any way by the appellant's legal representative. His evidence of his laboratory's rigorous procedures that eliminate a wrong result was also not disputed. Furthermore, it needs to be taken into account that the appellant was adamant that he requested that his blood be drawn for analysis and testified that his blood sample was indeed taken. Another consideration is that from the outset the complaint fingered only the appellant as the perpetrator of the rape and only the appellant was arrested in connection with the complainant's rape. Considering that the DNA of the appellant was found on the vulva swab, it is safe to accept that the appellant's DNA could only have been deposited onto the complainant's private parts through penetration by way of sexual intercourse, an activity that the appellant vehemently denied having engaged in with the complainant. Considering the evidence in totality, it is simply farfetched that the police could have known the real rapist, drawn his blood and then put the name and initial of the appellant on the blood sample. Under the circumstances, the ineluctable inference is that the blood sample was not tampered with and no

⁴ 1980 (3) SA 755 at 761

adverse inference can be drawn from the state's failure to adduce the evidence of the official who drew the blood.

[19] I am of the view that the circumstances of this case are such that the identification of the appellant as the person who raped the complainant was proven beyond reasonable doubt. There was no bad blood between the complainant and the appellant and they had been cordial to each other on the very day of the rape when the appellant went to fetch his son's jersey. The appellant knew beforehand that the window latch of the pantry at the complainant's home did not lock properly. He was able to confirm this state of affairs when he suggested and facilitated access by a child through the same window.

[20] The complainant's evidence is such that the clear impression is that the appellant's general appearance matched that of the assailant. It is not many people who have short hair and a piercing on the chin and use the same perfume as the one the appellant used. The DNA evidence was the proverbial nail on the coffin in as far as the state case was concerned.

[21] Having considered all the circumstances of the case, I am satisfied that the State discharged the onus of proving the case beyond reasonable doubt. The appeal against conviction therefore falls to be dismissed.

[22] The charge sheet read with its annexure is not a model of good draftsmanship. Despite its inept phraseology, it is however clear from the charge sheet, read with its annexures, as well as the discussions that occurred before the appellant pleaded, that the charge that was put to him was one charge, namely housebreaking with intent to rape and rape. In sentencing the accused the court *a quo* misdirected itself by imposing two separate sentences, five years for housebreaking and 25 years for rape instead of one sentence. This misdirection warrants the setting aside of the sentence imposed by the court *a quo* and a fresh consideration of the appropriate sentences.

[23] Rape was correctly described as degrading in the case of **S v Chapman**⁵ and as repulsive in the case of **S v Vilakazi**⁶ In **S v C** 1996(2) SACR 181C at 186D the court aptly stated as follows:-

“Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deeds thereafter after haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life”.

[24] The rape of a child is an abhorrent act. It is truly unfortunate that such reprehensible deeds are so rampant in our country. The prevalence of this scourge places a duty on all courts to impose heavy sentences on those who where she was expected to be safe, is another significant aggravating factor.

[25] Any civilised society views any form of abuse to its children in a very serious light. The moral blameworthiness of rapists that target children must weigh heavily on the minds of the sentencing courts. See **S v Swartz and Another**⁷ I am satisfied that the only appropriate sentence for the appellant is a lengthy custodial sentence. The 13 month period he spent in custody awaiting trial is also a factor that this court has taken into account.

[26] With regards to sentence, the court *a quo* concluded, correctly in my view, that there were substantial and compelling circumstances warranting a departure from imposition of the minimum sentence. It considered mitigating and aggravating factors and that the appellant spent 13 months in custody awaiting trial. The mitigating factors taken into consideration are the following: that he was 24 years old at the time of the commission of the offence; that he passed Grade 12; that he was gainfully employed and responsible for the maintenance of his two minor children.

⁵ 1997 (2) SACR 3 (SCA)

⁶ 2009 (1) SACR 552 (SCA).

⁷ 1999 (2) SACR 380 (C) at 387 h-j.

[27] The court *a quo* also took the following aggravating factors into account: that the appellant abused the trust relationship that existed between the complainant and the appellant; that the complainant was only 14 years old at the time of the rape and lost her virginity in a degrading manner at the hands of the appellant; that the complainant suffered psychological trauma; that the appellant did not show any remorse for his actions.

[28] In considering the appropriate sentence, consideration has been paid to sentences imposed in similar cases. See **S v Mahomotsa**⁸; **S v Bopape**⁹; **S v Ngada**¹⁰; **Director of Public Prosecutions, North Gauteng v Thabethe**¹¹; **S v MV**¹². It remains a trite principle that every case must be judged on its own facts.

[29] Having considered all the circumstances of the case, I am of the view that the appropriate sentence is 22 years imprisonment.

[30] The following order is made:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence imposed by the court *a quo* is set aside and replaced with the following: 22 years' imprisonment.
4. The sentence mentioned in paragraph 3 above is antedated to the 12th January 2012.

M.B. MOLEMELA, J

⁸ 2002 (2) SACR 435 (SCA)

⁹ 2003 JDR 0156 (W)

¹⁰ 2009 JDR 216 (EC)

¹¹ 2011 (2) SACR 567 (SCA)

¹² 2012 JDR 1094 GNF

I concur.

G.J.M. WRIGHT, AJ

On behalf of appellant:

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Instructed by:
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On behalf of respondent:

Adv M. Lencoe
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