



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: A875/12

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

18/04/2013

DATE

SIGNATURE

In the matter between:

VANDILE IGNATION BOOYSEN

APPELLANT

V

THE STATE

RESPONDENT

JUDGMENT

RATSHIBVUMO (AJ):

1. The appellant, a male person aged 22, was convicted of rape by the Regional Court, Sebokeng. Following that conviction, he was sentenced to 15 years imprisonment on the 9th May 2008. He appeals against the conviction and the sentence with leave of this court.

2. The State alleged that on the 26th May 2007 in Van der Bijl Park, the appellant had sexual intercourse with the complainant; a female person aged 20, without her consent. The appellant pleaded not guilty and offered a plea explanation that the sexual intercourse with the complainant was consensual.
3. A total of four witnesses testified during trial, two for the State and two for the defence, including the appellant. The complainant testified that she and her sister were drinking liquor at a party. She indicated to her sister she was both tired and drunk, and needed some rest. Her sister gave her a key to a room rented by her boyfriend in nearby premises for the complainant to use. She requested the complainant not to lock the door so as to not wake her up on her arrival later. She did as advised and went straight to the room, passing the appellant and another person sitting under a tree. She entered the room and slept. When she woke up, her sister, the appellant and the police were in the room.
4. She could not testify as to whether the appellant had sexual intercourse with her or not, as she was too drunk, and asleep, to feel anything. All she knew about the intercourse was is what her sister told her. She could only testify about the events after she woke up. She denied that the appellant had proposed love to her. Indeed it was common cause that there was no love relationship between them.
5. The complainant's sister testified that the complainant was very drunk when she left the party, and staggered her way to the room. Later she followed the complainant and found the door to the room closed. The men seated under a tree in that yard enquired from her as to what she

was looking for. This made her curious. She used a drum tin to peep through the room's window. She observed the appellant having sex with the complainant. The complainant appeared to be asleep, and one leg of her jeans had been pulled out. She was still wearing her sunglasses.

6. She rebuked the appellant for having sexual intercourse with the complainant in that state. The appellant opened the door. The complainant was still asleep and only woke up after the police had arrived, upon which she started crying. The police took her for medical examination.
7. The appellant testified that the complainant was sober when she arrived at the premises. He was seated with his friends under a tree. The complainant approached him and expressed disappointment that they did not have sex the previous night when they were together. She offered to have sex with him, using suggestive and crude language. She walked to a room where he followed her. Once inside the room they had consensual sexual intercourse, 'twice'. They were interrupted by the presence of the complainant at the door. He held the door closed for him and the complainant to get dressed, after which he opened.
8. On entering the room, the complainant's sister saw a R20 note on the floor, and angrily enquired from him whether he thought that the complainant was worth R20 to have sex with. When he indicated that he did not pay the complainant for sex, she accused him of having sex with the complainant for free. The sister summoned the police. By then he (the appellant) was outside and the complainant was still inside. The door was locked from inside when the sister slammed it closed when she left. Before the police arrived a man said to be the complainant's

boyfriend, arrived. In order to gain entry, the man entered through a window.

9. Galela, a friend of the appellant confirmed the appellant's version about the alleged conversation between the appellant and the complainant referred to above. He further testified that he is the one who closed the door since the appellant and the complainant had left it open during their sexual intercourse.
10. The medical report (the so called J88) completed by a doctor who examined the complainant was handed in by agreement. Under gynaecological findings, the doctor noted "fresh tears" next to fossa navicularis, "whitish discharge" and reached the conclusion that there was "evidence of recent forceful penetration." These findings were not disputed. That concluded the evidence.
11. The trial court preferred the State's version over the appellant's, and convicted him. Before us it is submitted on his behalf that the State had not proved his guilt beyond a reasonable doubt, and that the accused's version was reasonably possibly true which entitled him to an acquittal. The State supports the conviction.
12. Before I consider the submissions in this regard, it is helpful to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. The proper approach is found in the following collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A). A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that

his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA); *S v Selebi* 2012 (1) SA 487 (SCA).

13. It is common course that the appellant had sexual intercourse with the complainant. The reason for the complainant's presence on the premises is also not disputed. The only dispute is whether the sexual intercourse was consensual. Corollary to that is whether the complainant was drunk or not.
14. The trial court found both the complainant and her sister to have been reliable and credible witnesses. On the other hand, it found the defence version to be self-contradictory and lacking corroboration where it should have been corroborated by the established facts. The court found it improbable, for example, that appellant would not have used his own room on the premises, had the intercourse been consensual. I cannot find any misdirection on the part of the trial court in any respect. The defence' version was in my view correctly rejected as being improbable in the circumstances. There is more reason why the appellant's version is not reasonably possibly true. The fact that, save for the one leg of her jeans pulled out, the complainant was fully dressed, even with the sunglasses, points away from consensual sexual intercourse.

15. What is clear from the established facts is that no consent was given by the complainant or at least, when she was sober. The record is replete with sufficient indications of the complainant being drunk. The appellant clearly took advantage of that. Even if it were to be accepted that the appellant had sought her consent, such consent would still be vitiated by her state of drunkenness. In *R v K* 1958 [3] All SA 323 (A), the following was said:

“The position is more difficult in cases where the woman has been defrauded into consenting and more difficult still when her mind is affected not by the accused’s threats or fraud but by a pre-existent disability, such as that produced by mental disease, hypnosis, drugs or intoxicating liquor. In such cases there may be, and in the case of intoxication there certainly is, a wide range of degrees of disability. At the one end of the scale, if the woman is insensible from any cause she clearly cannot be a consenting party, nor is it easy to see how the impression could arise that she was consenting.”

See also *S v Swartbooi* [2006] JOL 16530 (C).

16. For these reasons, I conclude the appellant was rightly convicted and the appeal against conviction should fail.
17. I turn now to the sentence. As a general rule, an appeal court may not interfere with a sentence unless there is a material misdirection by the trial court or unless the sentence is startlingly inappropriate with there being a striking disparity between it and the sentence the appeal court would have imposed – *S v Michele and Another* 2010 (1) SACR 131 (SCA). The question therefore is whether the sentencing court properly exercised its discretion. The mere reason that the sentence imposed is different from the one the appeal court could have imposed is not sufficient ground to interfere with the sentence.

18. From the annexure completed by the public prosecutor, attached to the J15, the appellant was charged with rape read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (the Act) which provides among others, for a sentence of 10 years' imprisonment for a first offender. However, for unexplained reasons, the public prosecutor did not read into the record what was drafted in the charge sheet at the commencement of the trial. The transcribed record reflects that the appellant was charged with rape read with section 51 (1) of the Act, which prescribes life imprisonment in the event of conviction on a rape charge in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice. The basis on which the State would rely on section 51 (1) was not stated, either on the charge sheet or on record. However, it later appeared that the learned regional magistrate relied on the provisions of section 51 (1).
19. It is imperative for the State to indicate in the charge sheet the basis on which it would rely on the provisions of section 51 (1) of the Act on a rape charge. This affords the accused an opportunity to plead accordingly and prepare for the case he has to meet. The explanation of the prescribed sentences should not be a mere lip service but should be meant to assist the accused to prepare his defence properly.
20. In the present case, the appellant was not charged with raping the complainant more than once. The charge sheet (both drafted and transcribed) reflects one count of rape. No evidence was led to trigger the provisions of section 51 (1) for the court to impose life imprisonment. It seems that the learned regional magistrate relied on the

evidence of the appellant that he had “two rounds” of sexual intercourse with the complainant. He was not asked to elaborate what he meant by ‘rounds’, the duration, positions and places where the same was done.

21. In *S v Blaauw* 1999 (2) SACR 295 (W), the court had to impose a sentence after a referral by the Regional Court for sentence. The accused had been convicted of raping the complainant three times. At page 300, the court held:

“[m]ere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.”

22. In *S v Mavundla* 2012 (1) SACR 548 (GNP), the accused ejaculated thrice in the process of raping the complainant. Asked about the durations and intervals she had testified that they were on bed and off the bed without real intervals but just continuous sexual intercourse, lasting about 2 hours. The regional court had found that the complainant was raped more than once. On appeal, this court held that, that was no basis to find that such were several counts of rape. The appellant was found to have raped the complainant once. Accordingly, the sentence of life imprisonment imposed by the regional court was set aside.
23. For these reasons, section 51 (1) of the Act was not applicable to the facts of the present case, but section 51 (2) was. The minimum sentence provided for in the relevant section is 10 years imprisonment for a first

offender, which the appellant is. The learned regional magistrate clearly misdirected himself in this regard. We are therefore at large to interfere with the sentence and impose the sentence we deem appropriate in the circumstances. While I appreciate the magistrate's reasoning in finding substantial and compelling circumstances justifying a lesser sentence than the sentence he perceived to be applicable, the reasoning was based on a wrong premise that life imprisonment was applicable. I am of the view that had this been approached correctly, the prescribed sentence of 10 years imprisonment would not have been deemed to be disproportionate.

24. To sum up, the appeal against the conviction should fail, while the appeal against the sentence should succeed.

25. In the result, the following order is made:

1. The appeal against the conviction is dismissed;
2. The appeal against the sentence is upheld;
3. The sentence of 15 years imprisonment is set aside and replaced with the following: **'The accused is sentenced to 10 years imprisonment.'**
4. The substituted sentence is antedated to 9 May 2008 in terms of section 282 of the Criminal Procedure Act 51 of 1977

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree,

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD : 8 APRIL 2013

JUDGMENT DELIVERED : 18 APRIL 2013

FOR THE APPELLANT : ADV CPJ STRYDOM

**INSTRUCTED BY : MILLS & GROENEWALD,
VEREENIGING**

FOR THE STATE : ADV KM MASHILE

**INSTRUCTED BY : DIRECTOR OF PUBLIC
PROSECUTIONS, PRETORIA**