



IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

01/11/2013.

Case No: A811/2010

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
(4)	

28/10/2013 [Signature]

In the matter between:

AA MASWANGANYI

Appellant

VS

STATE

Respondent

JUDGMENT

Bam AJ

1. The appellant was convicted in the Regional Court on one count of rape and sentenced to life imprisonment. At the time of his conviction in 2009, the appellant, in terms of the provisions of the wording of the then section 304 of the Criminal Procedure Act, had an automatic right to appeal in a case where life imprisonment was imposed, hence this appeal against both the conviction and sentence.

2. At the trial the appellant, accused 1, and his co-accused, were legally represented. Both pleaded not-guilty to a count of rape and a count of robbery of a girl of 17, allegedly committed on 19 February 2005. The appellant's defence was a complete denial of the allegations against him.

(Accused 2 was eventually acquitted on both counts.)

3. The complainant's evidence can be summarised as follows. On 19 February 2005, at about 5:30, on her way to a funeral, she came across four boys. They grabbed her by the throat and threw her down. One throttled her and her cell phone was taken. Three of her assailants went away leaving the fourth, which had a bottle of beer in his hand. This assailant threatened to hit her with the bottle if she would dare to scream. He then instructed her to walk to a bushy area. There he raped her. She pointed out accused 2 in court as the culprit. Whilst accused 2 was raping her, another one of her attackers returned. (It later turned out to have been the appellant.) The latter produced a knife with which he threatened her. He then also raped her. He further ordered her not to look at him. When she disregarded that instruction and looked at him he scratched her on the right eye with his knife. After the rape she called out to a passing security guard. She was crying and the guard accompanied her to a nearby house where a certain Pastor Chabane resided. She told Pastor Chabane what happened and the pastor took her home. She was subsequently examined by a Dr Mabuza. After having laid a complaint with the police she went with the police to certain shebeens in search of her attackers. The search was unsuccessful. She, however, on her own, kept looking for the culprits. About nine days later, at a venue called Mabunda lounge, she noticed the appellant. Upon entering the lounge she also recognised the second accused. She then alerted the police and led them to the appellant and his co-accused. She said she recognised the two from their features as well as the fact that they were still wearing the same clothes. She also recognised a third member of the assailants.

4. Pastor Edwin Chabane confirmed the complainant's evidence regarding the report she made to him and the fact that she was crying. He also confirmed that the complainant said that she did not know her attackers but that she would be able to identify them if she would come across them again.
5. According to the evidence of Sergeant Mitchell, a forensic analyst in the SAPS, he found that the DNA of the blood sample of the appellant matched the DNA mixture that was found in the sample taken from the complainant.
6. The required chain evidence was proved by the State by adducing the evidence of Dr Mubiza, sergeant Tshabalala, Captain Masingi, detective constable Shimangi and Ms Mahlangu.
7. According to the medical evidence contained in the standard J88 form, completed by Dr Mubiza, the doctor's conclusion was that the injuries sustained by the complainant were consistent with recent vagina penetration.
8. The appellant testified. He denied that he had intercourse with the complainant. He told the court that on the date in question he was at his home with his uncle Kgotso Mupane. He said he knew accused 2 only by sight. Pertaining to the matching DNA, he said that it, apparently the analysis, could have been a mistake. During cross examination he said he was 20 years old at the time the crime was allegedly committed. He denied that he saw accused 2, whom he only knew by sight, on that day. The trial magistrate also put several questions to the appellant. I will return to that issue later in this judgement.

9. The appellant's witness, Mr Kgotso Mpumane confirmed the appellant's evidence as far as his alibi was concerned.
10. The second accused also testified. He similarly denied having had intercourse with the complainant.
11. The court *a quo* found that the State had proved its case against the appellant on the charge of rape and rejected the appellant's denial as not reasonably possibly true.
12. In evaluating the evidence the court is obliged to consider the evidence in totality in order to determine whether the State has proved its case beyond reasonable doubt or whether the accused's exculpatory version may be reasonably possibly true. The court must further bear in mind that the accused does not have to prove his innocence. It is trite that after having considered all the evidence a court finds that the State's case is unassailable, there is no room for a finding that the accused's version may be reasonably possibly true. See **S v Trainor 2003(1) SACR 35 SCA**.
13. The complainant was a single witness. Although section 208 of the Criminal Procedure Act provides that a conviction may follow on the evidence of a single witness, the cautionary rule pertaining to the evidence of a single witness applies.
The standard cautionary rule in respect of evidence of identification, also applies. This cautionary rule requires that the trial court should have been satisfied that the complainant was both truthful and reliable.

14. In this matter the identification was a so-called "*dock identification*". There was no prior identification parade held. The latter manner of identification is however not *per se* inadmissible but must be approached with the necessary caution. In this regard it must be taken into account that the complainant already recognised the appellant, and pointed him out to the police, after having searched for her assailants for nine days.
15. The submission made on behalf of the appellant that a further cautionary rule applies by reason of fact that the complainant was a minor, has no substance. She was already 17 years of age at the time the incident occurred. Mr De La Rey, appearing for the appellant, was unable to refer us to any authority supporting his submission in that regard.
16. The trial court found that the appellant was linked to the crime by the DNA.
17. The submission made on behalf of the appellant that the blood sample taken from him was obtained unconstitutionally, is without substance. Section 37(1)(c) of the Criminal Procedure Act provides that the police are allowed to take steps to have a blood sample of an arrested person taken. In this regard the police clearly acted in accordance of the said provision. The DNA evidence, including the so-called chain evidence, was properly proved by the State and, in my view, correctly accepted by the trial court.
18. The argument that the magistrate entered into the arena by asking a certain number of questions "*in assisting the State to prove the vital elements of the case*" stands to be rejected. The magistrate, in my view

was entitled to put the specific questions, the appellant is now complaining about, to the appellant. It has been stated before, on many occasions, that a criminal trial is not a game. See **R v Hepworth 1928 AD 265 at 277** and **S v M 2006(1) SACR 155 SCA** par 281. I could find no reason to say that the magistrate's questioning was irregular, or as submitted by Mr De La Rey, that the magistrate assisted the State in proving the chain evidence.

19. It follows that the evidence against the appellant proved by the State was, in my view, unassailable. Accordingly, as alluded to above, there is no room for a finding that the appellant's version may be reasonably possibly true. Therefore the trial court was correct in convicting the appellant on the charge of rape.
20. With regard to the sentence of life imprisonment, it is trite that the powers of this Court to interfere with the sentence imposed by the trial court are limited. An interference with the sentence by this Court will be justified in the event of the trial court having erred in some or other material respect, or misdirected itself, or imposed a sentence which is disturbingly inappropriate. See **S v Nkosi 2011(2) SACR 469 SCA**.
21. Mr Maritz appearing for the State, made the concession that due to the fact that the charge sheet incorrectly referred to section 51(2) of the Criminal Law Amendment Act 107 of 1997, providing for a minimum sentence of 10 years, instead of section 51(1) providing for a life sentence, the court *a quo* erred in imposing a life sentence. In this regard Mr Maritz referred to the case of **Mashinini v The State (502/11) [ZASCA (21February 2012)]**. However in the most recent decision in that regard, **S v Kolea 2013(1) SACR 409 SCA**, at 414 pars[17] and [18], the Court disapproved of the majority decision in **Mashinini**, and ruled that the

error in the charge sheet, by referring to section 51(2) instead of 51(1) of Act 107 of 1997, did not render the proceedings invalid as far as the imposition of the life sentence was concerned.

22. The record in this matter reveals that before the State adduced any evidence the magistrate enquired from the legal representatives whether the minimum sentences provisions were explained to the accused. Both representatives confirmed. During judgement on the merits the magistrate referred to the evidence of the complainant, that she was raped by more than one person, and found that her evidence was to be accepted. In his judgment on sentence the magistrate specifically stated that the complainant was raped by more than one person and that the minimum sentence of life imprisonment was applicable. In this regard it is remarkable that in addressing the magistrate in applying for bail, Mr Chabalala, who appeared for the appellant at that stage, at no stage referred to, or noted an objection against the imposition of a life sentence. It is further remarkable that in the appellant's Notice of Appeal, containing the appellant's grounds of appeal, no mention is made of any misdirection by the magistrate regarding the applicability of a life sentence.
23. In the appellant's heads of argument Mr de la Rey did not make any submissions regarding sentence at all. It seems that Mr de la Rey, for an unknown reason, was under the impression that, pertaining to sentence, he could address the Court orally. This situation is totally unacceptable and actually justified an order striking off the appellant's appeal against sentence. However, we considered it expedient and in the interests of justice to dispose of the appeal on sentence as well. For this reason we allowed Mr de la Rey to address the Court on sentence as well.

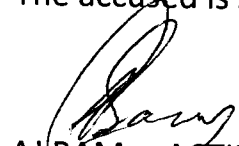
24. In considering all relevant circumstances, including the submissions made by counsel, there is no reason to find that the magistrate was wrong in finding that that life imprisonment was provided for in the circumstances. The concession made by Mr Maritz in that regard is clearly not consistent with the law as stated in **Kolea supra**. This issue also involves the right of an accused to a fair trial. As alluded to above, there is no indication that the appellant suffered any prejudice
25. In mitigation the appellant told the court that he was 19 years of age at the time the crime was committed and that he suffered from depression. The appellant was then referred for observation in terms of sections 77 and 78 of the Criminal Procedure Act. Subsequently a psychiatrist report was handed in reflecting that the appellant was fit to stand trial and that he, at the time the crime was committed, had the mental capacity to appreciate the wrongfulness of the deed.
26. The trial Court considered all relevant issues pertaining to sentence. That included the fact that the appellant was a first offender, his personal circumstances and the fact that he was 19 years of age at the time the crime was committed. These circumstances were not found to be substantial and compelling justifying a lesser sentence than the prescribed life sentence.
27. It is correct that rape is a very serious offence. In this regard the magistrate referred to what was said in **S v Chapmann 1997(3) SA 341 SCA**. In the case of **S v SMM 2013(2) SACR 292** at 299 par 17, the Court, with reference to **Chapman**, said the following:
"It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is violent and traumatic infringement of person's fundamental right not to be treated in a cruel inhumane or degrading way."

28. However, the appellant was 19 years of age when the crime was committed. Although not a minor anymore, the appellant's young age is surely an aspect which should be a major consideration when the issue of rehabilitation is considered. The fact that the appellant was a first offender is also, taken together with his age, on the probabilities, indicative thereof that the probability of rehabilitation can not be discarded.
29. The evidence did also not show that the complainant suffered any physical injury. Section 51(3)(aA)(ii) of Act 107 Of 1997 provides that an apparent lack of physical injuries to a complainant shall not be regarded as substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum. The lack of physical injuries will however still be relevant and taken into account when the existence of substantial and compelling circumstances is considered. See **S v SMM** *supra*, par [26]. On the other hand the traumatic impact on the victim, although no victim impact report was handed in, is surely an aggravating factor.
30. After having considered all relevant issues, I am of the opinion that the magistrate erred in not properly considering the issue of rehabilitation of the appellant, especially in view of the appellant's age at the time the crime was committed. It seems, in my view, that good prospects exist that the appellant may be rehabilitated and, accordingly, that life imprisonment is disproportionate and not the most appropriate sentence in the circumstances. For these reasons this Court is empowered to interfere with the sentence imposed by the magistrate.

31. I therefore suggest that the following order be made:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence succeeds.
3. The sentence imposed by the trial court is substituted by the following:

The accused is sentenced to 20 years imprisonment.



AJ BAM ACTING JUDGE OF THE HIGH COURT

I agree.



A HASSIM ACTING JUDGE OF THE HIGH COURT.

October 2013