

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case number: **A3/2013**

In the appeal of:

RAJOHN BARNARD MATSHELA

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* SNELLENBURG, AJ

JUDGMENT: SNELLENBURG, AJ

HEARD: 10 JUNE 2013

DELIVERED: 13 JUNE 2013

- [1] The appellant was charged with one count of rape and one count of robbery with aggravating circumstances and convicted on 16 May 2012 by the Welkom Regional Court. He was sentenced to ten years imprisonment on each count, subject to an order in terms of Section 280(2) of the Criminal Procedure Act 51 of 1977 that the sentences run concurrently. On 29 October 2012 the Court *a quo* granted leave to appeal against the convictions and sentences.

- [2] The appellant was charged with raping and robbing the complainant, Me. Julia Likhama on the 8th October 2011 whilst using a knife to perpetrate the crimes.
- [3] The complainant was a single witness with regards to the rape and armed robbery.
- [4] The complainant's testimony is that she visited a tavern on the 8th of October 2011 and left approximately twenty past one in the morning (the 9th of October 2011). The appellant was also at the said tavern and when she left he requested her to wait for him whereafter he accompanied her to her parental home. On the way they met Mr. Teboho Godfrey Sefatsa ['Sefatsa'], who also testified on behalf of the State.
- [5] In short the complainant's testimony is that the appellant, after they left the said Sefatsa, produced a knife. He threatened to kill her if she did not comply with his demands. He forced her to have sexual intercourse with him twice. He continuously threatened to kill her if she called for help. After a while the appellant forced the complainant to have oral sex with him by scraping the knife (for lack of a more accurate description) against her head. The appellant forced the complainant to hand over to him the ring she was wearing as well as the earrings she had borrowed from her brother. The appellant said that he would also keep the complainant's panties that he had taken earlier. The appellant then walked with the complainant to her home and left when she started knocking on the door. The complainant immediately reported the rape to her mother who told her to wake her brother

so that he can accompany her to the police station where she then went. The complainant was later also taken to the Kopanong Clinic where a medical examination was done and a DNA sample was taken.

- [6] The complainant admitted that she had lied to her mother, both with regards to where she was going the evening as well as where she had been, when she came home. She had told her mother she was visiting a friend and that she was raped and robbed on her way back from the friend.
- [7] The complainant suffered injuries as a result of the rape, to wit a scratch on her elbow from being thrown to the ground as well as a scratch on her back which was inflicted by the appellant with the knife whilst forcing her to have sexual intercourse with him.
- [8] According to the complainant the ordeal lasted approximately forty five minutes.
- [9] Sefatsa testified that he left the tavern after one o' clock in the morning hours when he saw the complainant and a man known to him as Rajohn. He identified the appellant. The appellant admits knowing the witness and also confirms that they have no ill feelings towards each other, nor had there been any prior to that morning.
- [10] Lastly Mrs. Maria Pulane Likhama ['Likhama'], the complainant's mother, testified that she opened the door for her daughter in the early hours when she knocked. She asked the complainant, since

she had left to go to a friend, where she was coming from. The complainant explained that she had met somebody on her way home from her friend's place and that this person took her and had raped her. The complainant showed her mother the scratch on her elbow and the 'scratch' on her back. She also reported that the person that had raped her had taken her ring, her brother's earrings she was wearing and her panty. Likhama confirms that she told the complainant to wake her brother up so that they could go to the police station to report the rape. With regards to the complainant's emotional condition her mother testified 'that she was tired like someone who was not herself'.

- [11] The DNA analyses was handed in, by agreement as exhibit "C" and the J88 (medical examination) of the complainant (also by agreement) as exhibit "D". The DNA analyses records that no male DNA was obtained from the sample.
- [12] The J88 records only a small excoriation on the complainant's right elbow, exterior surface. The medical examination also states that there are no genital injuries, but that does not exclude penetration.
- [13] The appellant admitted that he knows the complainant. As stated he admitted that he also knows Sefatsa. In his examination in chief he disclosed for the first time that he was relying on an alibi. He admits seeing the complainant during the night of the 8th of October 2011 at the said tavern. According to the appellant there was an altercation between them when the complainant stepped on his shoes without apologising. He lost his temper because she was rude and he slapped her in the face.

[14] That was the last he saw of the complainant according to the appellant. He left the tavern with a friend, Mr Lebogang Clayton Modise ['Modise']. He spent the night at this friend's place in Bedelia. He denied ever carrying a knife with him. He also denied that Sefatsa could have seen him with the complainant because he was not with her outside the tavern.

[15] Modise testified on behalf of the appellant. He confirmed the alleged altercation between the appellant and the complainant at the tavern during the evening in question. The witness testified that he and the appellant left the tavern shortly after seven o' clock due to the fact that the last taxi's left for Bedelia at eight o' clock. It transpired in cross-examination that they [the appellant and Modise] allegedly went to Modise's house, but then left for another tavern. When they eventually went home, the appellant spent the evening at his house. The witness testified in cross-examination that they were basically in each other's presence the whole evening, except on occasions where the one or the other would go to the bar or bathroom. I will revert to the defence case.

[16] The Court *a quo* was astute to the fact that the complainant was a single witness with regards to the rape and robbery. The Court *a quo* applied the cautionary rule, namely that in order to convict the appellant on the single evidence of a competent witness, the evidence must be substantially satisfactory in every material respect or there must be corroboration for the evidence. The said corroboration need not necessarily link the accused to the crime. See **S v Mahlanqu and Another** 2011 (2) SACR 164 (SCA) at 171b – c; **S v Heslop** 2007 (4) SA 38 (SCA) para [12]. By

corroboration is meant other evidence which supports the evidence of the witness and which renders the evidence of the accused less probable on the issues in dispute. See S v Heslop, *supra*; S v Gentle 2005 (1) SACR 420 (SCA) at 430j – 431a.

- [17] The advantages of the trial court to observe witnesses in court needs to debate. Although a court of appeal is not hamstrung by the findings of the Court *a quo*, lest the appellant's appeal become illusory, it will not lightly interfere with credibility findings. Naturally the observations and findings must be borne out by the record of proceedings. See S v Heslop, *supra*, para [13]; President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) paras [77] – [80].
- [18] The court below found that the complainant was a credible witness and that her testimony was satisfactory and clear in all material respects. Sefatsa's evidence corroborated the complainant's [single] evidence. He was also found to be credible and he places the appellant in the complainant's presence just prior to the rape and robbery. It renders the appellant's evidence and the alibi improbable. The first report was likewise found to be credible and the findings are justified by the record.
- [19] This does not mean that the judgment is perfect, nor need it be. The Court *a quo* made certain factual findings which are not consistent with the evidence. To name the most prominent, the court finds that it appears that the complainant did not show the injury on her back to the doctor, hence the reason why it was not

reflected in the medical examination. The complainant was however very firm regarding the fact that she did show the injury to the doctor during the examination. This does not, to my mind, affect the credibility of the complainant. Her mother also confirmed the injury. The magistrate also referred to the fact that the appellant's alibi only came to the forefront in his cross-examination by the prosecutor. This is factually wrong. The alibi was first disclosed by the appellant in his examination in chief. What cannot be gainsaid is that none of the state witnesses were confronted with the alibi.

[20] The main thrust of the appellant's criticism of the trial court's findings relates to alleged contradictions between the evidence of the complainant during the trial and the content of affidavits [exhibits "A" and "B"] she purportedly made to police officials when the complaint was made. It is argued that in light of these contradictions the trial court erred by accepting the complainant's evidence, it being single evidence of the rape and robbery, as it could not be said to be substantially satisfactory in every material respect. This aspect can be put to rest without much ado.

[21] The complainant testified that she related the events in Sotho to the police officer who took her statement. The affidavits were however drawn up in English by the police officer. The affidavits were never read back to the complainant before she signed them. This was not, nor could it be, disputed without evidence from the police officer who took the statements. The affidavits were admitted into evidence as exhibits "A" and "B". The appellant's representative indicated that the police officer who took down the

statement would be called by the defence, but they failed to do so. The affidavits were therefore not proved nor can they in light of the unchallenged testimony regarding the afore-mentioned manner in which they were made, be used to question the complainant's credibility. (**S v Govender and Others** 2006 (1) SACR 322 (E); **S v Mafaladiso en Andere** 2003 (1) SACR 583 (SCA) at 593e – 594h). If the considerations referred to in the aforementioned judgment are applied to this matter, then the complainant in any event gave a satisfactory explanation for the so-called inconsistencies. The inconsistencies were also not material so as to affect the complainant's credibility.

- [22] The findings to which I have referred previously do not detract from the credibility of the state witnesses, nor do they impact on the vital question, namely whether the state proved the appellant's guilt above reasonable doubt.

- [23] The Appellant's representative conceded, correctly, that the late disclosure of an alibi impacts on the credibility of an accused and that a false alibi can also corroborate the single evidence of a competent witness. See **Thebus and Another v S** 2003 (10) BCLR 1100 (CC). The corroboration by Sefatsa, *in casu*, renders the appellant's version totally untenable and improbable.

- [24] The Court *a quo* evaluated all the evidence, including the nature of the defence case and the probabilities emerging from the case as well as the credibility of the witnesses. The court rejected the appellant's alibi and, correctly to my mind, found that the appellant's guilt had been proved above reasonable doubt. To this

end it is apposite to record that the appellant and his alibi witness contradicted each other regarding their movements when they allegedly left the tavern. Modise was also significantly unconvincing in the attempt to satisfy the court that he could account for the appellant's whereabouts at all times during that fateful night. The Court *a quo* clearly approached Modise's testimony objectively and in the end rejected it, to my mind, correctly.

[25] It follows that the conviction must stand.

[26] On behalf of the appellant it was argued that the Court *a quo* failed to exercise its discretion properly as it should have found that there were substantial and compelling circumstances present. The argument postulates that the Court *a quo* erred by not deviating from the prescribed minimum sentence in light of alleged substantial and compelling circumstances.

[27] The appellant did not testify in mitigation of the sentence. Save to regurgitate the very scant factors in mitigation which were placed on record on the appellant's behalf and, which the Court *a quo* properly took into consideration when balancing the relevant interests applicable when sentencing an accused, no other circumstances appear from either the argument before us or the record which can be said to not have been properly considered. The sentences are not shockingly inappropriate. Having regard to all of the circumstances encountered in this matter, the minimum sentences imposed are manifestly fair and just.

[28] The effect of the sentences was ameliorated by ordering that they be served concurrently. This effect is that the appellant was effectively only sentenced to ten years imprisonment for his crimes. To my mind there is no merit in the argument that the trial court did not exercise its discretion reasonably.

[29] In result the appeal against the convictions and the sentences is dismissed.

N. SNELLENBURG, AJ

I concur.

L.J. LEKALE, J

On behalf of the appellant: Mr P. van der Merwe
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