

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No.: A107/2010

In the matter between:

**SHADRACK TELEKO GOTSENG**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

VAN ZYL, J *et* MATHEBULA AJ

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**HEARD ON:**

8 AUGUST 2011

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**JUDGEMENT BY:**

MATHEBULA AJ

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**DELIVERED ON:**

1 SEPTEMBER 2011

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[1] The appellant was arraigned before the Regional Magistrate, Bloemfontein on a charge of rape and indecent assault. He was convicted on both charges and sentenced as follows:-

**CHARGE 1:**      **Twenty (20) years imprisonment of which eight (8) years is suspended for five (5) years on condition that the appellant is not found guilty of rape or an offence of a sexual nature during the**

**period of suspension.**

**CHARGE 2: Ten (10) years imprisonment of which two (2) years was suspended for five (5) years on condition that the appellant is not found guilty of indecent assault or an offence of a sexual nature during the period of the suspension.**

[2] The appellant was granted leave to appeal against both conviction and sentence by Van der Merwe and Mocumie JJ only in respect of the question whether there was a duplication of convictions and the sentences.

[3] The facts are briefly as follows:-

On the 5<sup>th</sup> May 2007 the appellant and the complainant had attended a family gathering. Apart from the relatives, there were other people. Late in the night, the children went to sleep and the adults continued feasting.

The complainant woke up some time during the night in order to relieve herself. She went to the toilet, which was outside, but in the erf. It was in the toilet that the appellant raped her.

[4] **THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007**  
section 3 reads as follows:-

**“Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of B, is guilty of the offence of rape. Sexual penetration is defined in section 1, inter alia, to include any act which causes penetration to any extent whatsoever by;**  
**(a) The genital organs of one person into or beyond the genital organs, anus, or mouth of another person.”**

- [5] These sections entitle the state to charge an accused person with as many charges as possible. The section also prohibits splitting of charges or duplications of convictions.
- [6] The court has developed the same evidence and single intent test to deal with issues of this nature.

**See S v GROBLER 1966 (1) SA 507 AD at 511 and in S v MANELI 2009 (1) SACR 509 (SCA) at 512 para [8]**

- [7] It was submitted on behalf of the appellant that there was a duplication of convictions and sentences. Mr Makhene referred to the discrepancies between the testimony of the complainant and the medical report. He conceded that the appellant was correctly convicted on the charge of rape.
- [8] The state represented by Mr Mthethwa correctly conceded that the state in the court a quo had failed to prove that there was both vaginal and anal penetration. If such penetration occurred, whether those two (2) acts were closely connected to each other or not. He submitted that the only conclusion

to be drawn was that the conduct of the appellant constituted a single criminal transaction. He agreed that the appellant was correctly convicted on a charge of rape.

[9] Evaluating the evidence in totality, I am of the view that the court a quo erred in finding the appellant guilty of the second charge. It is unclear whether anal penetration took place on that day and, if so, when did it occur? Further, if it occurred, who caused it? The only mention of anal penetration was made by the doctor who examined the complainant. The complainant did not testify to that effect. In the absence of her testimony, the conviction on charge number two cannot be supported and ought to be set aside.

[10] I make the following order:-

**10.1 The conviction and sentence on charge number one (1) is confirmed.**

**10.2 The appeal on charge number two (2) is upheld.**

**10.3 The conviction and sentence on charge number two (2) is set aside.**

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**M.A. MATHEBULA, AJ**

I agree.

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**C. VAN ZYL, J**

On behalf of the appellants:

Adv JS Makhene  
Instructed by:  
Bloemfontein Justice Centre  
BLOEMFONTEIN

On behalf of the respondent:

Adv S Mthetwa  
Instructed by:  
Director Public Prosecutions  
BLOEMFONTEIN