

Reportable: Yes / No Circulate to Judges: Yes/No Circulate to Magistrates: Yes/No

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: CA&R44/2011

HEARD: 26/09/2011

DELIVERED: 21/10/2011

In the matter between:

QUINTON JOBO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: WILLIAM, J et HUGHES-MADONDO, AJ

JUDGMENT

HUGHES-MADONDO, AJ

1] The appellant, Quinton Jobo, was charged with count one- assault, count two- kidnapping, count three -assault with the intent to do grievous bodily harm and count four- rape. On 14 April 2008 he was convicted, in the Regional court of Kimberley, and was subsequently sentenced on 15 April 2008 to twenty five years imprisonment. Leave to appeal was granted by the court below against conviction and sentence.

2] On 1 December 2006 at about 22h00 the complainant, M M a 16 year old female, was returning to her home having visited with her friend Grace Phutang. Whilst her and Grace walked towards Koos Street, where she lived, they heard the appellant call out to the complainant.

3] They pretended as if they had not heard him and ignored his calls. The appellant then proceeded towards them. He grabbed the complainant by the arm and enquired why she was not responding to his call.

4] The complainant replied that she had not heard him. He then requested her to accompany him half way to his home. She said that he should rather accompany her half way instead. He agreed to do so, however as they turned a corner he

threatened and forced her in the direction of his home. Grace who was not far noticed this and she proceeded to the complainant's home to seek assistance.

5] On route to his home with the complainant the appellant assaulted her by slapping her. He also had in his possession a broken bottle with which he threatened to stab her if she did not comply.

6] On arrival at his home they proceeded to his outside room which was situated at the back of the main house. He demanded that the complainant sleep with him. During his quest to have sexual intercourse with her, he injured her on the left side of her face with the broken bottle.

7] He forced her to undress and pushed her on the bed. He climbed on top of her and had sexual intercourse with her without her consent. After having his way with her, he lay next to each other on the bed.

8] Whilst they were lying there complainant's mother arrived. She was accompanied by Grace. She forced open the door to the appellant's room and on entering the complainant got up from the bed and proceeded to get dressed. She reprimanded the complainant and even slapped her. She also reprimanded the appellant for keeping her daughter and making her his

“wife”.

9] The three of them then left proceeding homewards leaving the appellant behind. The complainants’ mother’s testimony is that she had warned her daughter on a number of occasions to refrain from walking about at night.

10] Both the mother of the complainant and Grace noticed that the complainant had been bleeding around the area of her left ear. Grace even assisted the complainant in trying to stop the bleeding by putting paraffin on the wound.

11] Grace’s evidence is that she had gone to seek the assistance of the complainant’s mother when she noticed the appellant force the complainant to accompany him.

12] Both the complainant and Grace confirmed that they had known the appellant before the incident. He regularly visited the owner of the yard within which they had lived. They further confirmed that the complainant had never been in a relationship with the appellant.

13] Magdaleen Olivier, a registered nurse, conducted an examination of the complainant one day following the incident. She observed a fresh wound on the side of the complainant’s face which she said was possibly caused by a

sharp object.

14]When she examined the complainant, she noted that there were signs that the complainant had had sexual intercourse less than seventy two hours before.

15]The appellant testified in his defence. He confirmed that he was with the complainant on the day in question. However he denied having had sexual intercourse with her.

16] He stated that by the time that the incident took place he and the complainant had been involved in a relationship for the past six months. Further, that by the time that this particular incident took place, he and the complainant had already had sexual intercourse on two occasions.

17]He testified that Grace was a friend his and he knew her well. As regards the complainant's mother he said that she had never approved of his relationship with the complainant.

18]His evidence was that on the day of the incident at around 20h30/21h00, he was seated with a friend in his room when the complainant came by to visit.

19]On her arrival his friend left, leaving them on their own. He said he went to buy two beers for him and the complainant.

As they sat and drank the beer, Grace arrived. She informed the complainant that her mother was looking for her. Grace then left after being advised by the complainant that she would return home shortly.

20] After a while Grace returned, this time with the complainant's mother. He confirmed that the complainant's mother shouted and slapped her in his presence. He went on further to say that she threatened him by saying that he would see what was going to happen to him. The females then all left, leaving him behind in his room.

21] During his testimony it emerged that he even recalls the exact days when he had had sexual intercourse with the complainant. He said that the first time that they had sexual intercourse was October 2006 and the last was 24 or 25 November 2006.

22] The issue in this appeal is whether on the day in question the appellant had sexual intercourse with the complainant without her consent.

23] A court of Appeal is very reluctant to upset the findings of the trial court, as the trial judge has the advantage of seeing and hearing the witnesses and observing their personalities and demeanour. The trial court is in a better position to draw

inferences than the appeal court. The trial judge has an advantage in determining what is probable and what is improbable having observed the witnesses in the course of the trial. See **R v DHLUMAYO AND ANOTHER 1948 (2) SA 677 (A) at 705.**

24]Ironically in this case the appellant's version corroborates the complainant's version as regards material aspects. To illustrate but a few: the appellant confirms having been in the company of the complainant on the day in question; he admitted that the complainant's mother accompanied by Grace came to his room; that they found him and the complainant lying on his bed in his room; he admits that the complainant was slapped and reprimanded by her mother in his presence; he said that he knew Grace well as she was his friend; he confirmed that the complainant, her mother and Grace left his room together.

[25] On examination of the evidence in its totality I find that the evidence of the appellant which corroborates that of the complainant is further corroborated by her mother and Grace's testimony.

26]The complainant in this case was a single witness and as such this court is mindful of the danger inherent in relying on the evidence of a single witness. To this end I refer to the dictum which is found in **R V MOKONYA 1932 OPD 79 at 80** where the court held; *"the uncorroborated evidence of a single, competent and credible witness is no doubt declared to be sufficient for a conviction ..., but in my opinion ...should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect."*

27]In *casu* the evidence of the complainant is corroborated in several material respects. Her version that she was forcefully taken to the appellant's home is corroborated by the evidence of Grace. Her evidence that she was in a state of undress when found in the appellant's room is corroborated by her mother as well as Grace.

28]Her evidence that the appellant subdued her by injuring her with the broken bottle is corroborated by the evidence of her mother and Grace that she had been bleeding in the vicinity of the left ear when they found her at the appellant's home. This injury is confirmed by the registered nurse who examined the complainant the following day. The nurses finding of signs of intercourse within seventy two hours of the

examination further corroborates the complainant's version.

29] In light of the above and having regard to the totality of the evidence, the appellant's version that the complainant had of her own free will visited him that night, that all they did was kiss, that the last time he had sexual intercourse with the complainant was at least a week before the relevant time and that she must have inflicted the injury to her face herself in order to implicate him can safely be rejected as false.

30] Certain minor contradictions existed in the evidence of the state witnesses but these in my opinion were not material and damning to the states evidence in totality. It is expected that with the passage of time, witnesses will not have a perfect memory of every detail pertaining to the incident concerned. In fact alarm bells should ring if indeed they have a perfect memory of events or their memories of the events are exactly the same. In the latter instance it could be said that the witnesses collaborated with each other before giving their evidence.

31] In light of the evidence, only one conclusion can be drawn and that is, that the appellant had sexual intercourse with the

complainant on the day in question without her consent.

32]This court accepts the evidence of the complainant as being reliable of what indeed transpired on that day. The appellant's evidence is therefore rejected as being improbable and false.

33]It was correctly conceded by the state that by setting out four different charges as was done in this case there appears to have occurred a splitting of charges. The other charges preferred against the appellant and his actions related thereto were all part and parcel of achieving this objective of raping the complainant.

34]The appellant committed the act of rape and in doing so he took the complainant threatened her, took her against her will and had sexual intercourse with her without her consent. These entire acts were entwined within his quest to commit the act of rape.

35]The correct charge that was supposed to be preferred against the appellant is only that of rape. The appellant was correctly convicted of the charge of rape in the court below and the convictions relating to the other charges should be

set aside.

36]Turning to deal with sentence, I am mindful of the principles set out in **S v PILLAY 1977 (4) SA 531 (A) at 535E-G**, *"As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in the imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence"*.

37]The appellant was a second offender and therefore the minimum sentence applicable in terms of section 51 Part II of Schedule 2 (ii) of the Criminal Procedure Act 105 of 1997 is that of twenty years.

38]Mr Hollander representing the state argued that if one considered the circumstances as to how the rape occurred, these had to be considered as aggravating and as such the

court is entitled to impose more than the minimum sentence.

39]Further that the sentence of twenty five years imposed by the presiding officer in the court below was appropriate in the circumstances.

40]I am mindful of the judgment of **Holmes JA, S v Rabie 1975(4) SA 855 (A) at paragraph 2.6(1)** “[the] punitive sanction should be proportionate in severity to the degree of blameworthiness (seriousness) of the conduct.” In addition the principle set out by **Chaskalson P in S v Makwanyane 1995 (2) SACR 1 (CC) at paragraph 129** “punishment must to some extent be commensurate with the offence.”

41]Taking the above into consideration I am not of the view that the circumstances of this rape warrant deviating from the minimum sentence. In saying so I am not convinced that the circumstances fall within the category of “the worst category of rape” - See **S v Abrahams 2002 (1) SACR 116 SCA.**

42]Having concluded that the circumstance surrounding the rape does not warrant a deviation from the minimum, the sentence that I then impose would be antedated to 15 April 2008 being the date upon which the appellant was

sentenced.

In the circumstances the following order is made:

- 1. The appeal against the convictions is successful to the extent that the convictions on counts one, two and three are set aside.**
- 2. The appeal against the conviction on count four (rape) is dismissed.**
- 3. The sentence of twenty five years imprisonment is set aside and is replaced with a sentence of twenty years imprisonment.**
- 4. The sentence is antedated to 15 April 2008.**

W HUGHES-MADONDO

ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

(i) costs of such procee

(ii)

I concur

WILLIAMS

JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

<u>On behalf of the Appellant:</u>	Mr. A Van Tonder (Legal Aid Board)
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<u>On behalf of the Respondent:</u>	Adv Q Hollander (Office of the DPP)
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