

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A125/08

In the case between:-

THABO SAMELA

Appellant

versus

THE STATE

Respondent

CORAM:

VAN ZYL *et* MOCUMIE, JJ

HEARD:

24 NOVEMBER 2008

DELIVERED:

4 DECEMBER 2008

APPEAL

MOCUMIE, J

[1] The appellant appeared in the Regional Court, Welkom on 31 May 2007 on a count of rape. He was convicted as charged on 12 December 2007 despite his plea of not guilty and was sentenced to 10 (ten) years imprisonment. He now appeals against both the conviction and the sentence with leave of the Court *a quo* granted on 16 May 2008.

During the trial he was legally represented. He pleaded not guilty.

- [2] In his heads of argument and in oral argument Mr. Nkhahle, on behalf of the appellant, attacked the presiding officer's findings on the basis that the evidence of the complainant was not sufficient to have established the State's case beyond reasonable doubt. He submitted that the complainant's evidence was riddled with contradictions, inconsistencies and improbabilities; that the complainant and her witness gave contradicting evidence and thus the appellant's version should not have been rejected as not reasonably probably true.

BACKGROUND:

- [3] The complainant visited her friend, Lerato Msibi, on 8 October 2005. Late in the afternoon Lerato invited her and one, Vhuisa, to go to a shop to buy sweets. The three walked together. They met the accused and his friend along the way. The accused spoke to Lerato who dismissed him instantly. When Lerato was busy buying sweets inside the shop the accused

approached the complainant and spoke to her. What happened between the accused and the complainant thereafter is in dispute.

- [4] The complainant testified that the accused held her by her arm and pulled her away despite her protests. She believed that the accused was armed and stopped to resist. The accused led her to his home where he threatened her, forced her to undress and raped her. She testified that prior to this day she did not know the accused. She did not have a love relationship with the accused.

APPELLANT'S EVIDENCE:

- [5] In his defence, the accused denied that he raped the complainant. His defence in essence was that he had the consent of the complainant to have sexual intercourse with her. He had a relationship with the complainant over a year. On this day he met the complainant as arranged between the two of them. The complainant was alone. She asked the accused for money, R250,00 as she was in some undisclosed problem.

When the accused said he did not have R250,00 but could give her R50,00 the next day she offered to have sexual intercourse with him.

EVALUATION OF EVIDENCE:

[6] The submissions made in the heads of argument and during argument on behalf of the appellant have to be seen in the context of the following:

6.1 The complainant reported the incident immediately and was turned away by the police because they did not believe that she was raped. The fact that the presiding officer took this into account cannot be faulted. The inference that she drew was that had the complainant been attended to that night and taken for medical examination *inter alia* her emotional state would have been noted.

6.2 The fact that she was accompanied by her brother does not mean that he influenced her to lay a charge. The evidence does not show such an opportunity. In fact, the brother did not want to get involved and referred the

complainant to Lerato's mother.

6.3 There is no indication that anyone including her two friends would have known of her sexual escapade if she initiated it and went through with it without duress.

6.4 Lerato's objective evidence that the appellant tried his luck with her first and then pulled complainant away does not show willingness on the complainant's part or that complainant was interested at any stage.

6.5 In fact Lerato and Vhuisa rushed to report the incident to complainant's brother.

6.6 The contradictions between the complainant and Lerato are not material taken together with the other evidence but not in isolation. These contradictions were clarified. Some were a misunderstanding of the defence questions as they were phrased in a deliberate attempt to confuse her.

[7] The appellant's evidence when evaluated against the background alluded to above does not accord with the argument advanced by his counsel and the probabilities in the

case. In fact, his evidence shows a clear and calculated trail of aggression from the moment he met the complainant, pulled her away from her friends and even went a step further to make as if he had a relationship with her. His evidence shows that he took advantage of the complainant's naivety and young age.

- [8] None of the submissions and arguments raised by the defence indicated that the trial court acted irregularly or misdirected itself in any manner or material respect with regard to this conviction which would entitle this court to interfere with its decision. See **R v Dhlumayo** 1948 (2) SA 677 (AD) at 705 – 706 whereat Greenberg JA said:

“3. Where there has been no misdirection on fact by the trial judge, the presumption is that his(her) conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

The conviction on rape is in order.

- [9] The approach to be adopted in an appeal against sentence is

reflected in the following passage in the judgment of Nicholas AJA in **S v Shapiro** 1994 (1) SACR 112 (A) at 119j – 120c:

“It may well be that this Court would have imposed on the accused a heavier sentence than that imposed . . . : it is encapsulated in the statement by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 857D-F:

- '1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -
 - (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

See **S v Sadler** 2000 (1) SACR 331 (SCA) at 334d – g, where it has also been held that:

“The overemphasis of the effect of the appellant’s crimes, and the underestimation of the person of the appellant, constitutes . . . a misdirection and in the result the sentence should be set aside.”

See **S v Zinn** 1969 (2) SA 537 (A) at 540F – G. This must be equally true when there is an over-emphasis of the personal circumstances of the accused and an underestimation of the gravity of the offence. See **S v Salzwedel and Others** 1999 (2) SACR 586 (SCA) at 591.

- [10] The offence committed by the appellant is one of the most prevalent in the country. The commission of serious offences perpetrated under the influence of youthfulness has for long now pervasively dominated so much of life and living in South Africa. There are aggravating circumstances *in casu*. The presiding officer took into account the fact that the appellant had no previous convictions. The attack by the appellant on the complainant albeit no medical evidence was led or when it will heal with an emotional scar nobody can tell whether it will heal or not. The prescribed sentences give expression to the legitimate feelings of outrage which is experienced by

reasonable men and women in the community. A lengthy term of imprisonment sanctioned by the law would serve to instil confidence in the community that such behaviour inconsistent with the ethos of our Constitution will not be tolerated in any civilised society: Courts must project this message clearly and vigorously.

[11] Regard being had to all these factors, I am of the view that the sentence imposed by the trial court is appropriate and should not be set aside.

[12] In the result I make the following order:

Order:

- 1. The appeal against both the conviction and sentence fails and is accordingly dismissed.**
- 2. The sentence of 10 (ten) years imprisonment imposed by the presiding officer on 12 December 2007 is confirmed.**

B.C. MOCUMIE, J

I concur.

C. VAN ZYL, J

On behalf of appellant:

Adv. Nkhahle
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. A. Bester
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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