

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 18/08
Heard: 18/08/2008
Delivered: 29/08/2008

In the matter between:

JOHANNES PAULUS

APPELLANT

and

THE STATE

RESPONDENT

Coram: Lacock J et Williams J et Moloi AJ

JUDGMENT

Moloi A J:

1. Three accused persons appeared before Van der Walt, J in the Kalahari Circuit Court held at Kathu on two counts, viz rape and attempted murder. Accused 1 and 2 were convicted of rape whilst all the accused were acquitted on the charge of attempted murder.

2. Only accused 2 has appealed his conviction on the charge of rape to this court. The grounds of appeal are that the court a quo erred in finding that the evidence of the state supported the conviction despite the court also finding that the complainant, who is the only witness incriminating the appellant directly, was not a wholly satisfactory witness and that two police officers

testified that it was accused 3, and not 2, whom they found on top of the complainant on the scene of the crime.

- 3.** In a nutshell, the evidence of the state is that on 28 November 1998 the three accused accosted the complainant near the municipal grounds in Postmasburg at approximately 20h00. The complainant was walking home after she had accompanied her sister to her place of residence. The complainant was grabbed from behind and dragged to a spot where she was raped, firstly by accused 1 and thereafter by the appellant. When she was raped by accused 1, the appellant held her arms and accused 3 her legs. Thereafter the appellant raped her and accused 1 held her arms while accused 3 continued to hold her legs.
4. The complainant, who knew all her assailants very well, testified further that in the scuffle between her and her assailants, the appellant struck her with a beer bottle on her head as a result of which she sustained open wounds. Furthermore, as the appellant was raping her, the police arrived on the scene whilst the appellant was on top of her. She had been stripped of all her clothes but was fortunate to find her jersey which she used to cover her upper body. The appellant had also suggested that she be killed as they were all known to her.
5. On the other hand, two policemen that attended the scene confirmed the evidence of the complainant in as far as it related to the injuries she sustained, the condition in which she was found regarding her clothes, etc. They also confirmed finding one of the assailants on top of her probably raping her but insisted it was accused 3 and not the appellant.

6. This glaring contradiction in the state's case as to who was found on top of the complainant prompted the appeal. The appellant was granted leave to appeal by **Olivier J**, on the basis that another court might find differently. The trial court had preferred the evidence of the complainant in this regard over that of the police. The trial court had, however, also found that the complainant had not been truthful in other respects eg. as regards her state of sobriety which might have had an influence on her capacity of making a proper and reliable observation and, possibly, her recollection of the event as well. According to her, she had very little to drink much earlier in the day whereas the evidence of all the other state witnesses indicated that she was heavily intoxicated. Her evidence was further that the incident took place at approximately 20h00 whereas the overwhelming independent evidence indicated that it was between 23h00 and 24h00 when the incident occurred.

7. It is trite law that the onus is throughout on the state to prove its case against the appellant beyond reasonable doubt to found a conviction: **S v Chabalala** 2003(1) SACR 134; **S v Mattioda** 1973 (1) PH H(N); **S v Radebe** 1991(2) SACR 166(T) and countless other decisions.

8. When considering the evidence on appeal, certain guidelines are to be observed eg. the starting point is the assumption that the trial court was in a better position to adjudicate on the facts as it had the advantage of "seeing, hearing and appraising a witness.": **S v Francis**, 1991 (1) SACR 198 A at 204 D-E and that only "in exceptional cases" should the court of appeal be entitled to interfere with the evaluation of the evidence by the trial court: **S v Francis**, *supra*; Such exceptional cases will be

present when the court *a quo* clearly made a mistake in its evaluation of the evidence: **R v Dhlumayo**, 1948 (1) SA 139 (A) 697 and 705; **S v Tshoko** 1988 (1) SA 139 (A) and a collection of references in **Minister Estates (Pty) Ltd v Killarney Hills (Pty) Ltd** 1979 (1) SA 621 (A) 623-624 eg. by rejecting evidence placed before it unreasonably or placing emphasis on one aspect of the case and ignoring the other.

9. In this case the conclusion of the trial court indicates that far too much emphasis was placed on the evidence of the independent witness, Dinko, that the appellant played a leading role in the attack against the complainant and that, therefore, he must have been the one who raped her and that this corroborated the complainant in her assertion that the appellant raped her too. This is, of course, in contrast to the unequivocal evidence of the two policemen, who categorically stated that it was accused 3 they found on top of the complainant and certainly not accused 2 who was standing some distance away. It is important to note that the two policemen testified for the state in this matter and that their evidence constituted a contradiction of the complainant's evidence all within the State's case and around an issue of crucial importance in criminal prosecution, to wit the identity of the perpetrator.
10. In my view this was a manifest mistake warranting and calling for interference by this court as a court of appeal. This contradiction should have resulted in creating a doubt in the mind of the court *a quo* as to who, in fact, raped the complainant after accused 1. A doubt must have been created in the court's mind, as to the accuracy of the complainant's identification of the culprit.

11. The above view, however, does not dispose of the matter. There is evidence on record that the appellant abetted accused 1 when he raped the complainant by assaulting (kicking and trampling) her in order to induce her submission to the rape over and above hitting her with the beer bottle. He further held her arms whilst accused 1 was raping her. This raises the question of, in the circumstances of the case, whether or not the appellant can be said to have been an accomplice in the rape of the complainant by accused 1. Snyman, in **Criminal Law**, 4th edition p.269 defines an accomplice as;

"1. A person is guilty of an offence as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the offence and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of an offence by somebody else.

2. The word "furthers" in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of an offence, gives advice concerning its commission, orders its commission or makes it possible for another to commit it."

12. In order to make a decision as to whether or not the appellant was an accomplice to the rape of the complainant by accused 1 the court must be satisfied that the requirements for such a finding have been met, namely the nature of liability, the act or omission which furthers the crime, the unlawfulness thereof and

the requisite intention. In this case, the concession by both the counsel for the state and the appellant that it would be appropriate to convict the appellant of being an accomplice to the rape by accused 1, in the circumstances, was valuable to the court and the court is grateful to them. The court have also considered all the relevant factors placed on record to assess the appropriate sentence to be imposed if the appellant is convicted of being an accomplice to the rape of the complainant. To that end, both counsel made a valuable contribution as well. The court does not intend to deal further with this aspect.

13. In the circumstances the court makes the following order:

13.1 The appeal against the conviction on a charge of rape succeeds.

13.2 **The appellant is found guilty of being an accomplice to the rape of the complainant.**

13.3 **The appellant is sentenced to ten(10) years imprisonment.**

13.4 The sentence in 13.3 above is to be considered as having been imposed on 23 August 2001.

**K J MOLOI
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

I concur

H LACOCK
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur

C C WILLIAMS
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Appellant:	Adv. B Segone
Instructed by:	Kimberley Justice Centre
For the Respondent:	Adv. W. Baganeneng
Instructed by:	Director of Public Prosecutions