

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A78/2005

In the case between:

TEBOHO KAIZER PEETE

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* C.J. MUSI, J

JUDGEMENT:

RAMPAI, J

HEARD ON:

26 JUNE 2006

DELIVERED ON:

10 AUGUST 2006

[1] The appellant was convicted in the Phuthaditjhaba Regional Court and sentenced to 10 years imprisonment on the same day, the 31st October 2003. He now comes on appeal against the conviction and the sentence.

[2] The charge against the appellant was that he raped the victim at Maboletla Village in Qwa-Qwa on the 21st April 2003. He pleaded not guilty to the charge on the 28th October 2003.

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[3] As regards the merits, the version of the prosecution was narrated by three witnesses, namely: Moetsamang Selina Mohlakoana, Sergeant M.J. Ramakatane and Matereng Mosikili.

[4] Briefly stated the facts were that the complainant, M was the appellant's girlfriend. The couple had been dating for about two months at the time of the incident. She lived at Letsha-le-maduke Village, and he at Maboletla Village. On the 21st April 2003, in other words, Human Rights Day, she paid him a visit at or about 13h00. He wanted to make love to her. She did not want to. He then assaulted her, ordered her to undress and threatened to stab her with the knife unless she obliged. He put the knife on the floor next to the bed.

[5] Because she was afraid that he might harm her, she obliged. He then sexually penetrated her against her will. She was crying all along. In the end she managed to jump out of his bed and to run outside. She was naked. She screamed for help. People gathered on the scene. The appellant threw her clothes out to her at the request of the onlookers. She dressed up outside. Among the onlookers she noticed her fellow worker, Matereng. She told Matereng that the appellant had raped her. Both Matereng

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Mosikili and Sergeant Ramakatane testified that the victim was emotionally tearful, depressed and appeared to have just been assaulted.

[6] While the appellant was still in the house with the victim, an unknown woman came into the appellant's house. The appellant and the victim were in his bedroom. By then she was already naked. The appellant had already warned her not to say a word should someone come. He left her in the bedroom to attend to the visitor. He locked the bedroom door. The appellant had a 20 minute conversation in the kitchen with the other woman. In the meantime the victim put on her clothes. The knife was still on the floor of the bedroom with one window when the appellant re-entered. Once again the appellant assaulted and raped her. All this emerged for the first time during cross-examination.

[7] The appellant did not give evidence in his defence. No witness was called to give evidence for the defence. The defence case was simply closed.

[8] The only issue the trial court had to decide was whether the appellant had raped the victim or not. This it had to do on the version of the prosecution since it was the only version before the court.

[9] It was contended on behalf of the appellant that the actions of the victim cast some serious doubt on her claim that the appellant had raped her. Ms Bezuidenhout raised five issues on the strength of which she submitted that the state had failed to discharge the onus of proving the guilt of the appellant beyond reasonable doubt. She made the following submission:

“... dat daar veeltal inherente onwaarskynlikhede in klaagster se getuienis voorkom welke direk dui op haar ongeloofwaardigheid as getuie. Daar sal vervolgings kortliks verwys word na die relevante gedeeltes in haar getuienis.”

[10] Counsel for the appellant contended that it appeared that the appellant did not use the knife to force the victim into

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submission. In my view this is a lame contention. The victim's evidence was that the appellant first slapped her in the face several times because she did not want to have sex with him. Apparently, the slapping did not break her resistance. He then intensified the assault by resorting to a knife. He threatened to stab her to death unless she submitted to his sexual demand. She believed she was in danger. She submitted by undressing and climbing into his bed in accordance with his instructions. When the appellant realised that he had broken the victim's resistance, by threatening her with the knife, he put it down on the floor next to her. She was in tears while the appellant was with her in bed. That is what I understand happened in the bedroom.

[11] During cross-examination the victim spelt out the threat that accompanied the production of the knife. She was pertinently asked by the defence attorney, Ms Dyeyi to tell the court what the accused said. She merely flashed out details of the threat which induced her fear for the knife. The fact that she did not do so in her evidence in chief she did not diminish her credibility. The magistrate was correct in finding that the appellant threatened the victim with the knife.

[12] Counsel for the appellant also contended that the victim did nothing to draw the attention of the unknown woman in the kitchen to her plight in the bedroom. This was a thin argument. The victim did not know who the woman was and whether she would have been so sympathetic to her as to want to rescue her. It must be

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borne in mind that the bedroom door was locked. The bedroom window was too small. She could not escape in any way while the appellant was in the kitchen with the other lady. Throwing the knife out of the bedroom through the window was no useful option. Getting rid of the knife would probably have angered the appellant even more. The appellant would probably have grabbed another knife from the kitchen. Above all these odds the appellant had also warned her to remain silent should anyone show up. In my view the fact that the victim did not scream to attract the attention of the other woman did not suggest that she was not held up as a sex captive. Screaming would probably have worsened her desperate situation.

[13] The victim stood up and dressed up while the appellant was in the kitchen and she was alone in the bedroom. That was another indication that she was detained against her free will in there and that she was prepared to brake free. Seeing her already dressed up annoyed the appellant even more. He once again assaulted her and again forced her to undress and to lie down naked in his bed. At one stage she surprised him, pushed him off the bed and quickly dashed out of the house. She fled from the appellant naked and screaming. At the request of the onlookers the appellant threw her cloths at her.

[14] It is very unlikely that a lovers disagreement of the sort, suggested by the appellant's attorney in the court below, could have made the victim to behave in such an embarrassing manner. Such a hysterical and naked escape underlined her genuine fear and bolstered her version that she had been physically assaulted and violated.

[15] Counsel for the appellant further contended that the absence of medical evidence was an indication that the victim was not assaulted and raped. In my view this contention holds no water. Among the onlookers, the victim recognised Matereng. The victim instantly told Matereng that the appellant had just raped her. Matereng corroborated the victim not only about the first report she made but also about the signs that she had been assaulted, about her tearful emotional state, about her physical nakedness as well as her hysterical call for help.

[16] Sergeant Ramakatane corroborated the victim in certain respects. The report he received was to the effect that a woman had been raped at Mabulela. He rushed to the scene where he found the victim still crying. He could see that she had been

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assaulted. The victim was not immediately taken to the doctor by the police. The police woman responsible for the rape victims did not advise her not to bath in the meantime. As a result of the police neglect she bathed before she saw a doctor the next day. According to her the doctor examined her but completed no medical report form because she had already bathed and the doctor found nothing wrong. The explanation she gave was probably true.

[17] The poor quality of the service rendered by certain public hospitals in our country is a known fact. Lack of medical evidence can never override the direct evidence of the victim in the circumstances of this case. Important though such medical evidence is, it remains, of confirmatory and secondary importance as compared to the victim's original and primary version of events. I cannot see any reason why the court below should have rejected the victim's version simply because the customary medical report was not completed. The victim was not to blame for the doctor's omission to complete a medical record or the prosecutor's omission to call the police officer who had escorted her to the hospital. In my view none of the contentions raised materially tarnished the victim's credibility and weakened the case against the appellant.

[18] The appellant chose to remain silent. Since there was direct evidence implicating him, he did so at his own peril.

There was nothing to gain-say the victim's direct evidence incriminating him. In **S v CHONCO** 1991 (1) PH H66 AD, Milne JA stated that there was a clear distinction in our law between the failure of an accused to give evidence where the case against him was based on circumstantial evidence and the failure of an accused to give evidence where the case against him was based on direct evidence implicating him. The instant case falls in the latter category.

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[19] The state relied on the evidence of the victim who was a single witness. The trial court was aware of this and mindful of the dangers inherent in the uncritical acceptance of the evidence of a single witness. It seems to me that the magistrate followed the proper approach in the process of evaluating and analysing the victim's evidence. **S v SAULS & OTHERS** 1981 (3) SA 177 (AD).

[20] There were adequate safeguards in the corroborative versions of the two independent witnesses. Again the trial court adopted the proper approach in evaluating and analysing the versions of the two.

[21] Sitting as a court with appellate jurisdiction we cannot lightly interfere with the credibility findings of the trial court unless we are convinced that such findings were clearly wrong. **S v FRANCIS** 1991 (1) SACR 198 AD at 204 c – e. Notwithstanding the critique raised by the counsel for the appellant, I could find no material misdirection to justify our interference with the convictions. I would therefore confirm the conviction.

[22] The court below found that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence than the prescribed minimum of 10 years imprisonment. On behalf of the appellant it was contended that the court below erred in making such a finding. However, on behalf of the state the finding of the court

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below was supported.

[23] The court below took into account certain mitigating factors. It accepted that the appellant had passed grade 12 at school. He was employed as a clerk. He earned R500 per month. He was unmarried. He had no children. He inflicted no serious injuries on the victim. He had a clean criminal record. In addition to these factors it must be added that it appeared that the appellant was 37 years of age at the time of his arrest and that he was in custody for over six months before he was sentenced. These then were the mitigating factors.

[24] The aggravating factors were also taken into account. The gravity of the crime of rape. The interest of the community. The prevalence of the crime of rape. The cunning measure of planning.

[25] Commutatively considered, I could find nothing so substantially compelling in the appellant's personal circumstances to justify deviation from the prescribed minimum sentence.

Notwithstanding the absence of serious physical injuries as well as the absence of serious psychological trauma the mitigating factors were overshadowed by the aggravating factors in this case. Lest we forget, we have to remind ourselves that the victim was insulted, degraded and humiliated by the appellant's conduct. I could find nothing shockingly severe and disturbingly inappropriate about the sentence. In my view the court below sentenced the appellant in a proper and balanced manner. Therefore I would also confirm the sentence.

[26] Accordingly I make the following order:

26.1 The appeal fails in *toto*.

26.2 The conviction and the sentence are confirmed.

M.H. RAMPAL, J

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I concur.

C.J. MUSI, J

On behalf of the Appellant:

Adv. I.J. Bezuidenhout
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of the Respondent:

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

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